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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center
Petitioner,

v.

HEATH ALLEN WILKINS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
Volume I

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

CASSANDRA K. DOLGIN
Assistant Attorney General
of Counsel
Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Petitioner

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-2441

Heath Allen Wilkins,

Petitioner-Appellee,

vs.

Michael Bowersox,

Respondent-Appellant.

Appeal from the United States District Court for the Western District of Missouri

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Submitted: March 10, 1997

Filed: June 8, 1998

Before McMILLIAN AND HANSEN, Circuit Judges, and MAGNUSON,[1] District Judge.

HANSEN, Circuit Judge.

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[1]The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

The Superintendent of the Potosi Correctional Center in Mineral Point, Missouri, Michael Bowersox (Respondent), appeals from the judgment of the district court[2] granting Health Allen Wilkins' petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1994). In 1986, Wilkins pleaded guilty to first-degree murder and received a death sentence for a Missouri state trial court. The district court granted the writ on multiple grounds, including the court's belief that Wilkins' waiver of counsel, his guilty plea, and his waiver of the right to present mitigating evidence were not entered into knowingly, intelligently, and voluntarily. Wilkins v. Bowersox, 933 F.Supp. 1496 (W.D. Mo. 1996). We affirm.

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[2]The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

I.

From infancy through his teenage years, Wilkins suffered severe physical and emotional abuse at the hands of his mother and other adults in his life. He began abusing drugs as a kindergartner on his way to school. At the age of 10, he became a ward of the state as a result of his involvement in a burglary. A mental health evaluation at that time described Wilkins as a severely depressed boy with homicidal and suicidal tendencies. During the years that followed, he was transferred in and out of mental health facilities. By the age of 16, Wilkins was living on the streets with three other teenagers.

On July 27, 1985, at the age of 16, Wilkins and his three teenaged companions robbed a liquor store and delicatessen in Avondale, Missouri, and committed a murder during the court of the robbery. According to their plan, which the record shows was primarily formulated by Wilkins, one of the Wilkins' companions grabbed the woman working behind the counter, Nancy Allen, and held her while Wilkins viciously inflicted multiple, fatal stab wounds. A few weeks later, the Kansas City Police Department arrested Wilkins and his accomplices.

After questioning by the police, Wilkins confessed to the murder and robbery. A juvenile court, after denying a defense motion for a mental examination, determined that Wilkins could be tried as an adult. At the arraignment, Wilkins' court-appointed counsel, Fred Duchardt, entered pleas of not guilty and not guilty by reason of mental disease or defect. Pursuant to that plea, the Missouri trial court ordered Dr. Steven Mandracchia, a psychologist at the Western Missouri

Mental Health Center, to examine Wilkins. Dr. Mandracchia initially examined Wilkins on November 27, 1985, and concluded in his subsequent written report that Wilkins was competent to stand trial and that at the time of the offense, Wilkins was not suffering from a mental disease or defect within the meaning of the Missouri statute. (J.A. at 908-14.)

In January 1986, Wilkins informed Mr. Duchardt that he wished to be executed, which prompted Mr. Duchardt to have Wilkins examined a second time. In March 1986, Dr. William Logan, a psychiatrist at the Menninger Foundation, examined Wilkins and found that although Wilkins' mental state at the time of the crime did not meet the legal criteria for insanity under Missouri law, he believed that Wilkins suffered from a mental disease and that his mental functioning was significantly impaired. (Id. at 930.) Dr. Logan did not make a conclusive finding regarding Wilkins' competency to stand trial, but he wrote that "emotional issues may prevent him from acting in his own best interests." (Id. at 928.)

On April 16, 1986, the Missouri trial court conducted a competency hearing at which both Dr. Mandracchia and Dr. Logan testified. Dr. Mandracchia reiterated his earlier findings, explaining that he interviewed Wilkins for approximately 95 minutes and believed that he was competent to stand trial. Dr. Logan's testimony was also consistent with his earlier report. He stated that Wilkins was "psychiatrically ill" with a "plethora of mental difficulties" and was a "very impulsive individual who really doesn't think through the consequences of some of his decisions." (Id. at 627, 637.) Dr. Logan, however, did not make an express finding regarding Wilkins' competency to stand trial. At

the competency hearing, neither Dr. Mandracchia nor Dr. Logan offered opinions on Wilkins' capacity to make a knowing, intelligent, and voluntary decision to be executed or to waive constitutional rights. At the conclusion of the testimony, the court found Wilkins to be competent to proceed to trial.

Immediately after the court judged Wilkins competent to stand trial, Wilkins stated that he wished to waive his right to counsel and proceed pro se, because he desired to receive a death sentence and his lawyer would not help him get the death penalty. The court postponed a determination on Wilkins' request and set a hearing date for one week later. On April 23, 1986, after some brief questioning by the court, the court accepted Wilkins' waiver of counsel. The court appointed Mr. Duchardt as "standby counsel" to act as a resource person for Wilkins when and if Wilkins called on him. Wilkins then informed the court that he wished to plea guilty to all of the charges against him. The court deferred action on the proposed guilty plea until May 9, 1986.

At the May hearing, he court questioned Wilkins regarding his decision to plead guilty and encouraged him to accept the assistance of counsel. Wilkins reiterated that he did not want the assistance of counsel and wished to plead guilty. The court accepted Wilkins'

pro se guilty pleas[3] and scheduled a sentencing hearing for June 27, 1986.

At the sentencing hearing, he state presented evidence of the crime and contended that because the crime involved depravity of mind and was committed in the course of a robbery, there were sufficient aggravating circumstances to warrant the death penalty. Wilkins continued to proceed pro se, through standby counsel was present. Dr. Logan testified about Wilkins' mental health background at sentencing, but Wilkins objected to some of the mitigating circumstances thus offered. The trial court sustained most of Wilkins' objections. Wilkins explained that he preferred the death penalty over life in prison. At the conclusion of the sentencing hearing, the court sentenced Wilkins to death. He was 17. He took no steps to appeal his plea or his sentence.

The Supreme Court of Missouri appointed the state public defender as amicus curiae to brief and argue "any issue subject to review" during the mandatory statutory review of his death sentence. Wilkins, acting as his own attorney, appeared personally and told the Supreme Court of Missouri that he did not want the assistance of an attorney, and he took issue with some of the remarks made by the public defenders

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[3]In addition to pleading guilty to first degree murder, Wilkins pled guilty to unlawful use of a weapon and armed criminal action. He was sentenced to life imprisonment on the armed criminal action charge and to five years' imprisonment for unlawful use of a weapon. The district court's decision in this habeas case only addressed Wilkins' murder conviction and death sentence. See Wilkins, 933 F.Supp. at 1501.

arguing the case. he also told the Supreme Court of Missouri that his decision to seek the death penalty was a rational one. Wilkins v. State, 802 S.W.2d 491, 496 (Mo. 1991) (en banc). After hearing and observing Wilkins as he attempted to waive counsel at this proceeding, the court ordered Dr. Sam Parwatikar, a psychiatrist with the Missouri Department of Health, to examine Wilkins with respect to his competence to waive counsel on appeal. After examining Wilkins, Dr. Parwatikar concluded that Wilkins was not capable of waiving his right to counsel. Heeding Dr. Parwatikar's determination, the Supreme court of Missouri set aside its prior proceedings and appointed counsel to represent Wilkins despite his protestations. New briefs were filed and the court heard arguments anew. Nevertheless, the court affirmed Wilkins' conviction and death sentence on a 4-3 vote at the conclusion of its direct statutory review. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987) (en banc).

Less than one year later, on June 30, 1988, Wilkins, who was then 19 years old, decided that he did not want to be executed and filed a motion for postconviction relief pursuant to Missouri Rule of Criminal Procedure 24.035 (1988), in an attempt to set aside his conviction and sentence. Among other claims, Wilkins asserted that his waiver of counsel and guilty plea were not knowingly and voluntarily made. The sentencing court held a hearing regarding Wilkins' motion from May 22 through May 26, 1989. At this postconviction hearing, Wilkins, with the assistance of appointed counsel, introduced the testimony of several psychiatrists and psychologists who had examined him. Dr. Dorothy Lewis, a professor psychiatry at the New York University School of Medicine, explained that Wilkins' paranoia motivated his decision to waive

counsel and that his thought processes were confused and illogical throughout the former proceedings. (State Postconviction Tr. at 27, 47-48.) Dr. William O'Connor, a psychologist, testified that Wilkins' guilty plea was not a voluntary and intelligent decision, but rather an emotionally-driver decision that was the product of his mental disorder. (Id. at 252.) Dr. Logan also testified and agreed with Dr. Parwatikar's earlier conclusion that Wilkins was not "competent" to proceed as his own attorney, even though Dr. Logan was previously ambivalent regarding Wilkins' competence to stand trial. Dr. Logan also believed that Wilkins' waiver of counsel was an emotionally-charged impulsive decision. (Id. at 494.)

In response, the state called Mr. Duchardt and Dr. Mandracchia to testify. Mr. Duchardt stated he did not believe that any of Wilkins' decisions were made knowingly, intelligently, and voluntarily. (Id. at 642.) He had consistently and forcefully made the same point in the trial court's proceedings. Dr. Mandracchia explained that his initial 95-minutes examination was not designed to address the issue of whether Wilkins' waiver of counsel and guilty plea were knowing, intelligent, and voluntary. The postconviction court thus ordered Dr. Mandracchia to perform an additional evaluation of Wilkins that would be directed at these issues. After conducting clinical interviews lasting over seven hours, Dr. Mandracchia concluded that Wilkins' waiver of counsel, guilty plea, and waiver of offering mitigating evidence were made knowingly, but these decisions were not made voluntarily or intelligently. (Tr. of Resumed State Postconviction Hrg. at 893.) Dr. Mandracchia explained that throughout the previous state court proceedings at issue, Wilkins was not capable of considering and appreciating his full range of

options and believed that his only course of action was to receive the death penalty. The postconviction court simply rejected the uncontroverted evidence as "unpersuasive." The postconviction court denied relief, and the Supreme Court of Missouri upheld this decision with one judge dissenting. Wilkins, 802 S.W.2d at 501-02.

Wilkins then filed his petition for a writ of habeas corpus in federal court pursuant to 28 U.S.C. §2254, alleging multiple grounds for relief. The district court granted Wilkins' request for an evidentiary hearing and heard testimony in January 1996. Many of the same doctors who previously testified in the state court proceedings appeared at the federal evidentiary hearing and reiterated their previous findings, indicating that Wilkins' decisions were not made intelligently or voluntarily. Following the hearing, the district court found that Wilkins did not knowingly, intelligently, or voluntarily waive his right to counsel, enter his guilty plea, or waive his right to offer mitigating evidence at sentencing.[4] Thus, the district court conditionally granted Wilkins' petition for habeas corpus relief, which will become a permanent grant of relief unless the state commences proceedings to afford him a new trial within

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[4]The district court also granted relief on two additional grounds: (1) that the prosecutor had a conflict of interest that violated Wilkins' right to due process, and (2) that the Supreme Court of Missouri's proportionality review was performed in a manner that also violated Wilkins' due process rights. Because we uphold the district court's decision to grant relief on the waiver and guilty plea grounds, we find it unnecessary to address the latter two issues.

60 days. The Respondent now challenges the district court's decision to grant habeas relief.

II.

A. Waiver of Counsel

We review the district court's legal conclusions de novo and its factual findings for clear error. Miller v. Lock, 108 F.3d 868, 870 (8th Cir. 1997). We defer to a state court's findings of fact if they are fairly supported by the record. Pryor v. Norris, 103 F.3d 710, 712-13 (8th Cir. 1997). See 28 U.S.C. §2254(d) (1994).

An accused has a constitutional right to self-representation but must knowingly, intelligently, and voluntarily waive the right to counsel. Faretta v. California, 422 U.S. 806, 819-21, 835 (1975). See Abdullah v. Groose, 75 F.3d 408, 412 (8th Cir.), cert. denied, 517 U.S. 1215 (1996). Whether a defendant validly waived his constitutional right to counsel is not a question of historical fact but a question requiring "application of constitutional principles of the facts as found," Brewer v. Williams, 430 U.S. 387, 403 (1977) (internal quotations omitted), which we review de novo. Because the assistance of counsel is crucial to our adversarial system of justice, courts must "indulge every reasonable presumption against the waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted), overruled in part on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981). To determine the validity of a waiver of counsel, courts consider the defendant's waiver in light of the totality of the circumstances, "including the background, experience, and conduct of the accused." Young v. Lockhart, 892 F.2d 1348, 1351 (8th Cir. 1989) (internal quotations

omitted). The Supreme Court has explained the requirements for a valid waiver of counsel.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality). To validly waive counsel, a defendant must actually understand all of the relevant considerations; thorough advice from the court alone is not sufficient. See Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993); United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995). Consequently, "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Von Moltke, 332 U.S. at 724 (plurality). The trial court should not merely take the defendant's statement that h is knowingly and intelligently waiving counsel "at face value." Wise v. Bowersox, 136 F.3d 1197, 1203 (8th Cir. 1998).

The Respondent contends that the district court erroneously found Wilkins' waiver of counsel was not knowing, intelligent, and voluntary without giving proper deference to the state court's findings. We disagree. The district court did not make any findings of historical fact that conflict with the state court's findings of

historical fact. In fact, the state court made no findings of fact relevant to the waiver of counsel. The district court's comprehensive review o the facts simply led it to a legal conclusion regarding waiver of counsel that differs from the state court's determination and demonstrated that the state's court's's conclusion was not fairly supported by the record.

Initially, we note that the state trial court's inquiry to determine the validity of Wilkins' waiver of his right to counsel was not the kind of "penetrating and comprehensive examination" required to ensure that an accused's waiver of counsel is valid. Von Moltke, 332 U.S. at 724 (plurality). The court's colloquy with Wilkins regarding his decision to waive counsel consisted predominantly of leading questions that failed to allow Wilkins to articulate his reasoning process. (See, e.g., J.A. at 648-49, 654-60, 675-694.) While Wilkins' simple "yes" and "no" answers indicated an intention to waive his right to counsel, this does not conclusively establish that his waiver of counsel was valid. A judge has an obligation to penetrate the surface with a more probing inquiry to determine if the waiver is made knowingly, intelligently, and voluntarily. See Von Moltke, 332 U.S. at 724 (plurality). Wilkins did, however, make it very clear to the trial court that the only attorney he would even consider taking was one who would do everything he could to clear Wilkins' path to the gas chamber. (J.A. at 657.)

The record reveals that at no time did the state court explain to Wilkins his possible defenses to the charges against him, nor did the court inform him of lesser included offenses or the full range of punishments that he might receive. (See J.A. at 647-95). The Respondent asserts that the statements

made by Mr. Duchardt during this inquiry establish that Wilkins did understand all of his potential defenses and possible punishments. While Mr. Duchardt indicated to the court that he had attempted to explain all of the available options to Wilkins (see J.A. at 659-60, 662), he testified that he never discussed lesser included offenses or ranges of punishment with Wilkins and that Wilkins did not give him an opportunity to explain all of his potential options (see Postconviction Tr. at 640-43; Dist. Ct. Evid. Hrg. Tr. at 87-88).

The state court also failed to adequately address and consider Wilkins' background in determining the validity of his waiver of counsel. Relying on the decision in Colorado v. Connelly, 479 U.S. 157, 164 (1986), the Respondent contends that a defendant's mental condition and other personal characteristics are not relevant to a determination of voluntariness unless there is proof that the defendant was subjected to coercive pressures. The Respondent's reliance on Colorado, is misplaced because that decision pertains only to the voluntariness of confessions and the application of the exclusionary rule to police conduct during interrogations. In the waiver of counsel context, we have explained that a defendant's background and personal characteristics are highly relevant in determining the validity of such a waiver. Young, 892 F.2d at 1351; see Edwards, 451 U.S. 482. Moreover, the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent, and voluntary. See Cash, 47 F.3d at 1088. While a findings of coercion bears upon the voluntary aspect of the waiver, it is not a necessary prerequisite to reach the conclusion that a waiver was not made knowingly, intelligently, and voluntarily.

In the present case, while the state trial court briefly addressed Wilkins' youth and limited educational background (J.A. at 649), the court took no account of Wilkins' upbringing. The record is uncontroverted that Wilkins was severely abused as a child by his mother and her boyfriends, that he had a history of drug abuse, and that by the age of 10, he had been in and out of mental health facilities and had been described as having demonstrated homicidal and suicidal tendencies. Given the combination of Wilkins' young age and the record evidence of his severely troubled childhood, the state trial court's colloquy with Wilkins was far from the kind of in-depth inquiry that is necessary to ensure a valid waiver of counsel.[5]

The state trial court erroneously believed that its previous finding that Wilkins was competent to stand trial was alone sufficient to mandate a conclusion that Wilkins' waiver of counsel was valid. (See J.A. at 650.) We believe this legal error also invaded the direct review proceedings in the Supreme Court of Missouri. See Wilkins, 736 S.W.2d at 415 (holding that "a finding of competency necessarily entails the ability to waive certain rights"). It also permeated the postconviction court's conclusion. (Resp. Ex. G, at 92 ("The court

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[5]We reject out of hand the Respondent's assertion that our evaluation of the state trial court's inquiry regarding the validity of Wilkins' waiver of counsel constitutes a new constitutional rule that may not be applied retroactively under the holding of Teague v. Lane, 489 U.S. 288 (1989). Fifty years ago, in Von Moltke, 332 U.S. at 724 (1948) (plurality), the Supreme Court established the requirement that a judge's inquiry regarding waiver of counsel must be comprehensive and probing.

concludes that he finding of competency of movant to proceed entailed the ability to waive certain rights and to make [the] decision to enter [a] plea of guilty and under the circumstances of this case to waive counsel and proceed pro se.")) It is true that the level of competency required to waive the right to counsel is the same as that required to stand trial. Godniz v. Moran, 509 U.S. 389, 398 (1993); Branscomb v. Norris, 47 F.3d 258, 263 (8th Cir.), cert. denied, 515 U.S. 1109 (1995). The Supreme Court has clarified, however, that a valid waiver of counsel requires more than competency to stand trial. The trial court must also "satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Godinez, 509 U.S. at 400. The Court further explained that the competency inquiry focuses on whether a defendant "has the ability to understand the proceedings" while the knowing and voluntary inquiry is aimed at determining "whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id. at 401 n.12. Relying on settled law, the Court explained, "In this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence." Id. at 400-401. The state court committed legal error by concluding that Wilkins' waiver was valid merely because he had been found competent to stand trial. In the postconviction proceeding, the Supreme Court of Missouri articulated the proper standard (that a waiver must also be knowing, intelligent, and voluntary), but affirmed the denial of relief by emphasizing Wilkins' competence, the trial court's opportunity to observe Wilkins, and Wilkins' use of standby counsel "when it met his purposes." Wilkins, 802 S.W.2d at 501-02. These elements,

however, do not necessarily lead to the conclusion that Wilkins voluntarily and intelligently waived counsel.

The uncontroverted record as a whole throughout the state proceedings indicates that Wilkins' waiver of counsel was not knowing, intelligent, and voluntary. The state court accepted Wilkins' waiver of counsel without making findings of fact and without explicitly concluding that Wilkins' waiver was made knowingly, intelligently, and voluntarily. The record before the state trial court simply does not support the conclusion that Wilkins had the requisite level of understanding necessary to establish that his waiver of counsel was knowing, intelligent, and voluntary. In addition to not being informed of all of his potential options, the evidence overwhelmingly indicates that Wilkins' state of mind precluded him from making a valid waiver of counsel. As early as the first competency hearing, Dr. Logan testified to the numerous mental and emotional problems that interfered with Wilkins' "decision making process at certain critical points." (J.A. at 627.) Dr. Logan described Wilkins as "a very impulsive individual who really doesn't think through the consequences of some of his decisions." (Id.) Dr. Logan also indicated that Wilkins' upbringing was devoid of "supervision or tutoring or guidance in terms of how to use his mind to make rational common sense decisions." (Id. at 629.)

On direct review in state court, the Supreme Court of Missouri ordered Dr. Parwatikar to perform a psychiatric evaluation of Wilkins for the purpose of determining Wilkins' capacity to waive the right to counsel on review before that court. He testified at the postconviction hearing that in his opinion, Wilkins was not capable of waiving the right to counsel at the time of his original waiver of counsel and guilty plea. (State

Postconviction Tr. at 849-50.) Dr. Parwatikar attributed Wilkins' inability to validly waive counsel to his mental disorders and upbringing and informed the court that Wilkins was also unable to waive counsel on direct appeal. Acting on Dr. Parwatikar's recommendation, the Supreme Court of Missouri most tellingly refused to permit Wilkins to proceed pro se; it appointed counsel to represent Wilkins on direct review, despite Wilkins' persistent and professed desire to waive counsel at its proceeding as well.

At the state postconviction hearing, the uncontroverted testimony of the several doctors who had examined Wilkins all indicated that he was mentally disturbed and that his decisions to waive counsel and plead guilty were the product of his mental illness and immaturity and not rational decision making. Dr. Logan, who for the first time was then addressing the validity of Wilkins' waiver, stated that Wilkins' decision did not make sense and was impulsive. Moreover, the postconviction court instructed the state's own witness, Dr. Mandracchia, to conduct an additional evaluation after Dr. Mandracchia revealed during the postconviction hearing that his initial examination was not directed at Wilkins' waiver of counsel but at whether Wilkins met the statutory competency requirements to stand trial. After further evaluation, Dr. Mandracchia unequivocally stated that Wilkins' waiver of counsel, while done knowingly, was not made intelligently or voluntarily. (Tr. of Resumed State Postconviction Hrg. at 893.) The state court made no fact-findings to indicate why it was unpersuaded by the unanimous testimony presented at the postconviction hearing, and the record simply does not support the state court's conclusion that Wilkins knowingly, intelligently, and voluntarily waived his right to counsel.

Similar evidence was adduced at the federal evidentiary hearing. Dr. Logan appeared once again and explained that Wilkins was driven by an "internal coercion" that prevented him from voluntarily or intelligently waiving his right to counsel. Wilkins, 933 F.Supp. at 1513. After considering the entire record, we conclude that the district court did not err in finding that Wilkins' waiver of counsel was not made knowingly, intelligently, and voluntarily.

Relying chiefly on the Supreme Court's decision in Drope v. Missouri, 420 U.S. 162 (1975), the Respondent argues that all of the expert testimony submitted after Wilkins' waiver of counsel is not relevant to a determination of the validity of the waiver. In Drope, the issue was whether the trial court sua sponte should have suspended trial until a competency evaluation of the defendant could be made. The Supreme Court noted in a footnote that the after-the-fact testimony of psychiatrists submitted in a postconviction hearing was not relevant to this determination. See Drope, 420 U.S. at 181 & n.17; James v. Singletary, 957 F.2d 1562, 1569-71 (11th Cir. 1992) (discussing Pate v. Robinson, 383 U.S. 375 (1966), upon which Drope heavily relies). Additionally, we have indicated that "[r]etrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored." Weisberg v. State of Minnesota, 29 F.3d 1271, 1278 (8th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). The context of the present case, however, differs significantly from the circumstances in either Drope or Weisberg. In those cases, the defendant attempted to attack his competence to stand trial or to plead guilty without ever having had the benefit of a contemporaneous competency hearing. In the present case, Wilkins'

competency to stand trial (the same level of competency being required to waive counsel) was contemporaneously evaluated, with a focus on whether Wilkins met Missouri's statutory definition of competency, and it is not now at issue. Those contemporaneous evaluations raised immediate, well-founded concern about Wilkins' ability to make a knowing, intelligent, and voluntary waiver, though not specifically addressing that subject. Dr. Logan's contemporaneous evaluation acknowledged in particular the existence of Wilkins' mental and emotional problems as well as the limitations those problems might impose on his ability to make rational decisions. Thus, the subsequent testimony of the same doctors is not the type of after-the-fact speculation of concern in Drope and Weisberg. Given the state trial court's failure to make a probing inquiry in spite of the extensive evidence of Wilkins' background, which had been in the record since the competency hearing, the district court did not err by considering the entire state court record.

B. Guilty Plea and Waiver of Mitigating Evidence

The Respondent asserts that the district court erred in granting Wilkins relief on the claims that his guilty plea and waiver of the right to present mitigating evidence were not made knowingly, intelligently, and voluntarily. Initially, the Respondent contends that Wilkins only raised the issue of his competence in state court and procedurally defaulted these other claims by failing to raise them in the state courts'. We disagree. The record indicates that Wilkins raised these issues in the state postconviction court and the appeal of that decision in the Supreme Court of Missouri, specifically asserting that his guilty plea and waiver of the right to present mitigating evidence were not knowing,

intelligent, and voluntary decisions. Wilkins did not procedurally default these claims.

We also believe that the district court correctly concluded that Wilkins' guilty plea and waiver of presenting mitigating evidence were not knowing, intelligent, and voluntary. To be valid, a guilty plea must represent "a voluntary and intelligent choice among the alterative courses of action open to the defendant," North Carolina v. Alford, 400 U.S. 25, 31 (1970), and the defendant must "possess [ ] an understanding of the law in relation to the facts." McCarthy v. United States, 392 U.S. 459, 466 (1969). We find that Wilkins' guilty plea and waiver of presenting mitigating evidence were not valid for essentially the same reasons that lead us to conclude that his waiver of counsel was not valid.

Initially we note that Wilkins' conclusory affirmation that he was pleading guilty voluntarily does not establish definitively that his plea was in fact valid. See Von Moltke, 332 U.S. at 724; Gonzales v. Grammar, 848 F.2d 894, 900 (8th Cir. 1988). As demonstrated above, the record indicates that Wilkins' youth, troubled background, and substantial mental impairments clouded his decision-making throughout the state proceedings. At the state postconviction hearing, Dr. Mandracchia directly stated his opinion that neither Wilkins' guilty plea nor his waiver of presenting mitigating evidence were intelligent or voluntary. Moreover, the record does not establish that Wilkins possessed the required "understanding of the law in relation to the facts." Mccarthy, 394 U.S. at 466. As mentioned earlier, the state court did not discuss possible defenses such as diminished capacity; the court failed to inform Wilkins of possible lesser included

offenses such as second degree murder and manslaughter; and the court did not explain the full range of potential sentences that Wilkins could receive. The court limited its discussion of sentences to the death penalty and life imprisonment without parole. (J.A. at 676, 682, 695-96.) The court's omission of other potential sentences is quite significant in light of Wilkins' statement to the court that he did not absolutely wish fr the death penalty but merely preferred it over spending the rest of his life in prison. (See J.A. 791-92.) Additional reports from Dr. Mandracchia indicate that Wilkins did not understand his legal alternatives. Dr. Mandracchia stated that Wilkins "would not, and functionally, could not, meaningfully entertain possibilities such as acquittal, insanity defense, conviction for a lesser included offense, mitigating circumstances, parole following a period of incarceration, etc." (Appellee's Br. at 14, citing Ex. P-33 at 4.) In light of this evidence, we conclude that the district court properly determined that Wilkins did not knowingly, intelligently, and voluntarily plead guilty and waive his right to present mitigating evidence.

C. Evidentiary Hearing

The Respondent claims that the district court erred in holding an evidentiary hearing. The Respondent asserts that the district court's decision to hold an evidentiary hearing stems from Wilkins' failure to fully develop the facts in the state courts and that the district court impermissibly expanded the record. We disagree. The district court held the evidentiary hearing because in its view the state courts had failed to make factual findings on certain issues, ignored the facts with respect to certain issues, and arrived at conclusions that were not supported by the record. Wilkins, 933

F.Supp. at 1504-05. Although the district court was not required to hold a hearing in this case, it exercised its discretionary power in an effort to resolve the deficiencies it found in the state court findings. See Townsend v. Sain, 372 U.S. 293, 318 (1963) (stating that in every case, a district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim"), overruled in part, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (holding habeas petitioner has no right to hearing to develop facts not developed in state court proceeding, absent a showing of cause and prejudice). See also Clemmons v. Delo, 124 F.3d 944, 952 (8th Cir. 1997) (noting that the Supreme Court's decision in Keeney v. Tamayo-Reyes did not alter a court's discretionary power to order an evidentiary hearing), cert. denied, 118 S.Ct. 1548 (1998); Jamison v. Lockhart, 975 F.2d 1377, 1381 (8th Cir. 1992) (same). The district court did not abuse its discretion in holding such a hearing in this case.[6]

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[6]Because we find the Respondent's assertion that the petitioner failed to develop the factual record in the state court to be erroneous, we need not decide whether the new statutory provisions concerning when a district court can hold such an evidentiary hearing added to §2254 by the Antiterrorism and Effective Death Penalty Act of 1996, signed into law on April 24, 1996, apply to this case. See 28 U.S.C. §2254(e)(2) (as amended) ("If the applicant has failed to develop the factual basis of a claim in the State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows . . . . "). We note the evidentiary hearing in this case was held some four months before the Act was signed into law. See also Lindh v.

D. Jurisdiction to Vacate Previous Order

Finally, the Respondent contends that the district court erred by vacating its previous order dated May 16, 1995, granting relief on only one of Wilkins' claims, after our court remanded the case "for resolution of all matters contianed in the first amended petition for writ of habeas corpus." (J.A. at 976.) Rule 60(b) of the Federal Rules of Civil Procedure affords district courts much discretion to vacate their orders. See Tungseth v. Mutual of Omaha Ins. Co., 43 F.3d 406, 409 (8th Cir. 1994). The district court did not abuse its discretion or exceed the scope of the remand order by choosing to decide all of Wilkins' claims in a single order. Similarly, we reject he Respondent's assertion that Wilkins' challenge to the validity of his waiver of counsel constitutes an abuse of the writ. The Respondent's abuse-of-the-writ claim hinges upon the argument that the district court exceeded its jurisdiction by vacating its previous order. Because the district court had the authority to vacate its previous order and consider all of Wilkins' claims together, we reject as meritless Respondent's assertion that Wilkins has abused the writ.

III.

In sum, we affirm the judgment of the district court, conditionally granting relief on Wilkins' claims that

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Murphy, 117 S.Ct. 2059, 2067 (1997) ("The provision [28 U.S.C. §2264(b) contained in new Chapter 154] thus confirms that Congress assumed that in the absence of such a provision, §§2254(d) and (e) (as new parts of Chapter 153) would not apply to pending federal habeas cases.")

his waiver of his right to counsel, his guilty plea, and his waiver of the right to present mitigating evidence were not made knowingly, intelligently, and voluntarily. Given our decision to uphold the grant of relief on these claims, we find it unnecessary to review the merits of Wilkins' additional arguments.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

HEATH A. WILKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0861-CV-W-5
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER

This is a petition for writ of habeas corpus under 28 U.S.C. §2254 by Heath A. Wilkins (petitioner), an inmate in custody at Potosi Correctional Center, Potosi, Missouri. The petitioner seeks to vacate his conviction for first degree murder and sentence of death entered by the Circuit court of Clay County, Missouri after petitioner waived counsel and entered a guilty plea.[1]

Background

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[1]The original named respondent in this action was Paul Delo, who was Superintendent of the Potosi Correctional Center when the petition was filed. Since then, Michael Bowersox has replaced Mr. Delo as Superintendent and thus has been substituted as the named respondent. For purposes of simplicity, the Court will refer to the respondent as "the State."

In the summer of 1985, Petitioner, who was then sixteen years old, lived in a public park in Kansas City with three other teenagers, Marjorie Filipiak, Patrick Stevens and Ray Thompson. The four of them planned and carried out the robbery of a liquor store in Avondale, Missouri, on July 27, 1985. According to the plan, Marjorie Filipiak went to the nearby North Kansas City Hospital and called a cab while the three boys went to the liquor store. Ray Thompson stayed outside the store to act as lookout, and Petitioner and Patrick Stevens went inside the store to rob it. During the robbery, Petitioner fatally stabbed the proprietor of the store, Nancy Allen, as Stevens held her.

Acting on an anonymous tip, Kansas City police arrested Petitioner and his associates in the park on August 10, 1985. After questioning by the police, Petitioner confessed to the murder and robbery. Because of his age, a hearing was conducted to determine whether he would be tried as an adult. Fred Duchardt, the Clay County Public Defender, was appointed to represent Petitioner at the hearing. After denying counsel's request for a mental examination, the juvenile court on August 15, 1985, entered an order allowing Petitioner to be tried as an adult.

Petitioner was charged as an adult with the offenses of unlawful use of a weapon, first degree murder and armed criminal action. At arraignment in the Clay County Circuit Court, counsel entered the alternative pleas of not guilty and not guilty by reason of mental disease or defect on Petitioner's behalf. Pursuant to that plea, the court ordered a mental examination of Wilkins. Steven A. Mandracchia, Ph.D., a psychologist at Western Missouri Mental Health Center, examined Wilkins in November, 1985.

In January, 1986, Mr. Duchardt visited petitioner in the Clay County jail. At that time, petitioner told Mr. Duchardt that he wished to be executed. A second examination was performed in March, 1986 by William A. Logan, M.D., a psychiatrist with the Menninger Foundation.

A competency hearing was held on Wednesday, April 16, 1986. Dr. Mandracchia testified that he did not believe petitioner had a mental disease or defect "as defined by" Missouri statute. He gave no opinion whether petitioner had a mental disease or disorder outside of the statutory definition, except that he "agree[d] with the past treatment records and past psychiatric and psychological diagnoses." Dr. Mandracchia concluded that petitioner was "competent to proceed". Although Dr. Mandracchia was not aware of petitioner's desire to be executed when he conducted his examination, he testified at the hearing that this fact did not alter his conclusion regarding petitioner's competency to proceed.

Dr. Logan testified that petitioner was "psychiatrically ill" with a "plethora of mental difficulties". However, he did not give an opinion on petitioner's competency to proceed because he interpreted Missouri law to require a psychotic disorder. Dr. Logan stated that although petitioner had no cognitive deficits, his emotional disabilities "could interfere with his decision-making process at certain critical points." Mr. Duchardt insisted that there was "considerable question" about petitioner's competency. Over Mr. Duchardt's protests, the court found him competent to proceed.

Mr. Wilkins then informed the court that he wanted to be sentenced to death. He also stated that he wanted to waive counsel because Mr. Duchardt would not help him get the death penalty. Counsel again reiterated his belief that petitioner was not acting competently. The court deferred action on Petitioner's request until a hearing the following week. On April 23, 1986, the court accepted the waiver of counsel.

Petitioner immediately asked to plead guilty to all charges and be executed. After a brief hearing two weeks later, the court accepted petitioner's pro se guilty plea on May 9, 1986 and a sentencing hearing was held on June 27, 1986. The State presented evidence of the crime and testimony by Dr. Mandracchia and Dr. Logan. Petitioner objected to any evidence of his mental disorders that could be construed as mitigating and joined in the State's request for the death penalty. The court found that the murder was wantonly vile, horrible or inhuman because it involved depravity of mind, and that the murder was committed in the course of a robbery. Then the court sentenced petitioner to death.

The sentence was reviewed by the Missouri Supreme Court pursuant to Mo. Rev. Stat. §565.035 (1986). The Office of the Public Defender was appointed to act as amicus curae for petitioner on the "appeal". At oral argument, Mr. Wilkins appeared personally before the Missouri Supreme Court, repeated his wish to be executed and requested that amicus counsel be discharged. The court ordered Sam Parwatikar, M.D., a psychiatrist with the Missouri Department of Mental Health, to examine petitioner to determine his "competence to waive counsel" on appeal. Dr. Parwatikar concluded that Petitioner "was

not capable of waiving his constitutional right to counsel."

Amicus counsel then moved to remand the matter to the Circuit Court for an evidentiary hearing on Wilkins' mental competence and waiver in light of Dr. Parwatikar's findings. The State objected, arguing that the review was limited to the statutory criteria in §565.035. The Missouri Supreme Court denied the motion for remand and appointed the Public Defender to act as counsel for Petitioner.

The Missouri Supreme Court affirmed Petitioner's conviction and sentence on direct statutory review, State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987), with Justices Blackmar, Donnelly and Welliver dissenting on proportionality grounds. Judge Donnelly also wrote separately that proportionality was the only issue properly before the court. On June 30, 1988, the United States Supreme Court granted certiorari to decide whether the execution of a sixteen-year-old offender per se violates the cruel and unusual punishment clause of the Eighth Amendment, and eventually held that it did not. Stanford v. Kentucky, 492 U.S. 361 (1989).

On the same day that the Supreme Court granted certiorari, petitioner filed a motion in the sentencing court pursuant to Mo.R.Crim.P. 24.035 to set aside his convictions and sentences. By that time, petitioner was nineteen years old and did not aspire to be executed. Counsel was appointed to represent Petitioner and a hearing on Wilkins' motion was held May 22-26, 1989. Dorothy Lewis, M.D., Jonathan Pincus, M.D., and William O'Connor, Ph.D., conducted testing and clinical interviews and concluded that

Wilkins suffers from schizoaffective disorder, a mental disease which rendered him incompetent to proceed at the time of his plea. Dr. Logan also testified that had he been asked to respond to the question posed in the Missouri Supreme Court's order to Dr. Parwatikar, he would have concurred with Dr. Parwatikar -- that Wilkins was not "competent" to proceed as his own attorney.

The State called Mr. Duchardt and Dr. Mandracchia. Mr. Duchardt again stated that he believed that Wilkins was not competent at the time of his plea dn sentencing hearing. Dr. Mandracchia testified that he would need to perform an additional examination of Petitioner to respond to the State's question about Wilkins' "competence to waive" counsel. Claiming surprise at Dr. Mandracchia's testimony, the State requested a mental evaluation by Dr. Mandracchia to determine whether petitioner was "competent to waive" his constitutional rights and plead guilty and whether petitioner's waiver of counsel and guilty plea were in fact knowing, intelligent and voluntary. After conducting the court-ordered supplemental examination, Dr. Mandracchia testified that the waiver of counsel, guilty plea and waivers of other constitutional rights were not intelligent and voluntary. Nevertheless, the hearing court denied the motion and the Missouri Supreme Court affirmed. Wilkins v. State, 802 S.W.2d 491 (Mo.) cert. denied Wilkins v. Missouri, 112 S.Ct. 131 (1991).

Petitioner then filed the Petition for Writ of Habeas Corpus currently before this Court. The First Amended Petition alleged thirteen grounds of constitutional error. On May 16, 1995, this Court entered an Order conditionally granting the Writ on one of Petitioner's claims on the basis of the state court

record, without an evidentiary hearing. The Court also considered and denied one other claim, but did not address the eleven remaining claims. After filing a timely notice of appeal, the State requested the Court of Appeals for the Eighth Circuit to remand the case to this Court of resolution of all remaining claims. The motion was granted on October 3, 1995.

After remand, Petitioner renewed his previous request for an evidentiary hearing. Over the State's objections, this Court heard testimony on January 5 and 30, 1996. Petitioner then voluntarily dismissed several claims. On April 23, 1996, this Court set aside the previous Order of May 16, 1995 pursuant to Fed.R.Civ.P. 60(b)6). The six claims remaining in the Amended Petition will now be considered. The facts relevant to each will be outlined as necessary. For the reasons set forth below, the petition will be granted.

Evidentiary Hearing

After the remand from the Court of Appeals, this Court exercised its power to hold an evidentiary hearing on dispositive factual issues in the amended petition. The Court's broad authority to do so is well-established under Townsend v. Sain, 372 U.S. 293 (1963). In Townsend, the Supreme Court held that district courts always have the discretion to hold evidentiary hearings on dispositive factual issues in habeas litigation: "In every case, [the district court] has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." Id., 372 U.S. at 318.

In reliance on Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992), the State asserts that the hearing

was not authorized. The standard adopted in Keeney to limit mandatory hearings in certain situations, however, does not purport in any way to limit a habeas court's prerogative to hear additional evidence if there is a factual dispute on nonfrivolous claims. E.g. Jamison v. Lockhart, 975 F.2d 1377, 1381 (8th Cir. 1992) ("we do not read Tamayo-Reyes as altering our discretionary power to order this hearing"); Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993); Burden v. Zant, 975 F.2d 771, 775 (11th Cir. 1992) rev'd on other grounds 510 U.S. 132 (1994); Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992). See Yohn v. Love, 76 F.3d 508, 516 (3d Cir. 1996).

The Court also believes that a hearing may have been mandatory. Under Townsend, a federal district court must hold an evidentiary hearing in six situations, including some circumstances in which the state courts previous held a hearing and made fact findings. Townsend, 372 U.S. at 313.2 Although it is not necessary to thoroughly examine the Townsend requirements now becuase there was a discretionary hearing, the Court notes that the first two circumstances

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2A hearing is mandatory if: (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the state factual determination is not supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing or (6) if for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Townsend, 372 U.S. at 313-319.

in Townsend may have compelled it in this case: (1) the merits of many dispositive facts were not resolved in the state court hearing; and (2) the state courts' determinations on some facts are not supported by the record as a whole.

Again, the State's objection based on Keeny v. Tamayo-Reyes is not persuasive. The limitaton on mandatory hearings imposed by Keeney has no relevance here. Keeney overruled Townsend only in part. It held that a hearing is not mandatory under Townsend's fifth circumstance ("the material facts were not adequately developed at the state court hearing") unless the petitioner can show cause for failing to develop the material facts in the state court and prejudice resulting therefrom or actual innocence. Keeney, 112 S.Ct. at 1719. Petitioner did not fail to develop the material facts in this case. The determinative evidence was presented to the state courts.[3]

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[3]On April 29, 1996, the State filed a motion to preclude consideration of all evidence presented at the hearing in this Court on the basis the April 24, 1996 amendment to 28 U.S.C. §2254(e)(2), which provides:

"If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (a) the claim relied on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would

After an exhaustive review of the entire file, this Court found that many disputed factual issues were not settled and some findings by the state courts were perplexing. The state record contains ambiguous or contradictory support for certain findings and conclusions, particularly those related to the claims challenging the waiver of counsel and guilty plea. Thus, this Court determined that an evidentiary hearing would be at least prudent and valuable, if not required. Given these concerns, with the prospect of a remand later for a hearing, the Court elected to hear additional evidence. See e.g., Blalock v. Lockhart, 898 F.2d 1367 (8th Cir. 1990). The facts left unresolved by the state courts and the disputable findings will be set forth as necessary in the section of the Order addressing the individual claims for relief.

Presumption of Correctness of State Court Findings

An issue distinct from the power to hold an evidentiary hearing is whether this Court is bound by the state courts' findings on dispositive factual questions. Under 28 U.S.C. §2254(d), a state court's

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be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."

This Court need not determine whether this provision applies retroactively to the evidentiary hearing this court held in January, 1996. Again, this limitation on evidentiary hearings in a federal habeas court applies where a petitioner failed to develop facts in state court, which did not happen in this case.

factual finding is entitled to a presumption of correctness unless one of seven factors listed in §2254(d)(1)-(7) is present or unless the factual finding "is not fairly supported by the record".[4]

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[4]28 U.S.C. §2254(d) provides in part:
In any proceeding . . . in a Federal court . . . for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction. . . evidenced by . . . adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless . . . the Federal court on a consideration of the record as a whole concludes that such a factual determination is not fairly supported by

This Court is also aware of the changes in the presumption of correctness standard set out in the amendment to §2254 which was signed into law on April 24, 1996.[5] However, the new statute does not govern the determination of any factual issues in this case. [C]ongressional enactments. . . will not be construed to have retroactvie application unless their language requires this result." Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988). At least one district court has already rejected the state's position:

> Although certain provisions of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 contain specific effective dates, neither the Act as a whole nor the amendments to §2254 contains such a date. See, Chapter 154, 28 U.S.C. §266(c). In contrast to Congress' silence with respect to the effective dates of the amendments to §2254, Chpater 154, which applies only to capital cases, contains a specific effective date provision. See, 28 U.S.C. §2266(c) (stating that "Chapter 154 of title 28,

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the record.

[5]That statute, 28 U.S.C. §2254(e)(1), provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application [sic] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

> United States Code (as amended by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.") The relevant legislation contains no language indicating that Congress intended the amendments to §2254 to apply to cases such as Petitioner's. The inclusion of language in Chapter 154 to the effect that the provisions in Chapter 154 "apply to cases pending on or after the date of enactment of this Act" indicates that Congress knows how to indicate that new legislation applies to pending cases when it intends to do so. The absence of similar language in the amendments to §2254 indicates that Congress only intended for such amendments to apply prospectively.

Schlup v. Bowersox, No. 4:92CV443, slip op. at 16-17 (E.D. Mo. May 2, 1996). This Court agrees with this sound analysis regarding the retroactivity of this portion of the new legislation.

Moreover, even if the revised provision §2254(e)(1) did apply, there are certain relevant legal doctrines preliminary to §2254(d) or §2254(e)(1) which are not affected by the new statute. The threshold question is what constitutes a "factual" finding, as opposed to a "mixed" question or a purely legal question. Further, common sense dictates that the first exception to the presumption of correctness under §2254(d) -- that the "merits of the factual dispute were not resolved in the state court hearing" -- would continue under the new statute. Here, this Court decides questions of law and decides factual issues not

resolved by the state courts even though the evidence had been developed there. The end result thus is the same, regardless of which statute applies.

Where factual determinations were made in the state court here, this Court affords a "high measure of deference." Sumner v. Mata, 455 U.S. 591, 598 (1982). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." Marshall v. Lonberger, 459 U.S. 422, 429 (1983).

Further, §2254(d) prvoides that even if the presumption applies, a habeas petitioner may rebut the presumption by establishing "by convicing evidence that the factual determination by the state court was erroneous". Such convincing evidence includes proof presented "at an evidentiary hearing. . . in the federal court." See Demosthenes v. Baal, 494 U.S. 731, 735 91990); Lahay v. Armontrout, 923 F.2d 578 (8th Cir. 1991). Under the new §2254(e)(1), the standard for rebuttal is essentially the same: by "clear and convincing evidence".

Section 2254(d) applies only to the state court's findings of historical facts. Legal conclusions are not entitled to deference on federal habeas corpus review. Wright v. West, 112 S.Ct. 2482 (1992); Sumner, 455 U.S. at 597; Brown v. Allen, 344 U.S. 443 (1953). This Court is also free to conduct an independent review of "so called mixed questions of fact and law which require the application of a legal standard to the historical fact determinations." Thompson v. Keohane, 116 S.Ct. 457, 459 (1995); Cuyler v. Sullivan, 466 U.S. 335, 342

(1980); Jones v. Jones, 938 F.2d 838, 842 (8th Cir. 1991).[6] For each allegation of constitutional error, the court will employ these legal standards in reference to the state courts' findings.

[6]As stated above, new §2254(e)(1) does not change this.

Analysis

I. Waiver of Counsel

Petitioner contends that he was denied his constitutional rights under the Sixth and Fourteenth Amendments because the waiver of his right to counsel was not made knowingly, intelligently and voluntarily. The State argues that he record supports the state courts' conclusion that the waiver was knowing, intelligent and voluntary. The State also asserts that the abuse-of-the-writ defense bars this Court's consideration of the claim after the remand from the Court of Appeals.

A. Abuse of the Writ

The abuse-of-the-writ doctrine generally prohibits a petitioner from raising claims in a subsequent habeas petition that could have been, but were not, raised in the first federal habeas proceeding. McCleskey v. Zant, 499 U.S. 467, 490 (1991). The general bar against abusive claims also extends to successive claims which raise grounds identical to those heared and decided on the merits in a previous petition. Sawyer v. Whitley, 505 U.S. 333 (1992).

This court did determine that petitioner had not validly waived his right to counsel and granted the writ of habeas corpus on that basis in an Order dated May 16, 1995. However, under the procedural circumstances in this case, this is not a successive claim and the abuse-of-the-writ defense is not applicable.

In the previous Order, this Court declined to address eleven of the thirteen allegations of constitutional error raised in the amended petition. The Court of Appeals thus remanded the case, before briefing or arguments on appeal, for resolution of the remaining issues. Petitioner raised the waiver of counsel issue again after remand, perhaps fearing that the failure to do so would be taken as a default. He also voluntarily dismissed with prejudice several other claims, paring down to six the number of remaining claims for relief. This Court then set aside the previous order and judgment under Fed.R.Civ. P. 60(b) so that all six issues would be decided in a single order, for the sake of clarity and judicial economy. Order dated April 23, 1996. Under no tenable theory is the claim barred from this Court's review. See Murray v. Delo, 34 F.3d 1367, 1374 (8th Cir. 1994). This is a first habeas corpus petition to which the doctrine of abuse of the writ does not apply. Lonchar v. Thomas, No. 95-5015 (U.S. Apr. 1, 1996).[7]

B. Merits

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[7]It is unclear from earlier pleadings whether the State asserts a procedural default defense to this claim. The Court notes, however, that the claim is not procedurally barred. The issue was presented to the Missouri Supreme Court in the "Motion to Reverse Judgment and Sentence and to Remand for Appointment of Counsel", filed by appointed amicus counsel after Dr. Parwatikar reported that Petitioner had not intelligently and voluntarily waived his right to counsel. The issue was raised again in the Rule 24.035 appeal, with reference to the relevant federal case law. See Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990).

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant in a state proceeding the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963). The accused person does have a corollary right to waive counsel and proceed pro se, but only if the waiver is knowing, intelligent and voluntary. Faretta v. California, 422 U.S. 806 (1975). The constitution "imposes the serious and weighty responsibility upon the trial judge [to determine] whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465 (1938). In doing so, the court must "indulge every reasonable presumption against waiver" because the purpose of the right to counsel is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights". Id., at 464, 468 (1938) (citing Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937).

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson, 304 U.S. at 464. "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948).

The trial court must make a meaningful inquiry to determine whether a particular defendant's waiver of these rights is a "voluntary and intelligent choice among the alternative courses of action". Schone v. Purkett,

15 F.3d 785, 788-89 (8th Cir. 1994). To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Von Moltke, 332 U.S. at 723-24.

Because Johnson commands that the unique characteristics and background of each individual defendant must be examined, the fact that an accused person tells the trial court that "he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility . . . . A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Von Moltke, 332 U.S. at 723-724. "[T]he ultimate test for whether there has been a valid waiver of the right to counsel is not the trial court's express advice, but rather the defendant's understanding". United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995).

A finding that a criminal defendant is "competent to proceed" does not resolve the issue whether his waiver of counsel is knowing, intelligent and voluntary.[8] These are two separate questions. Both must be answered in the affirmative before there can be an effective waiver of the constitutional right to counsel.

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[8]Petitioner has dismissed the claim that he was not competent to proceed, which this Court had denied in the previous order.

Godinez v. Moran, 113 S.Ct. 2680 (1993). In Godinez, the United States Supreme Court explained that "when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted". Id. at 2688. The Godinez Court finally explained the distinction between these two requirements, which has caused much confusion in this and other cases. The "focus of the competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actual does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id. at 2687, n.12 (emphasis in original) (citations omitted).

Thus, "a finding that a defendant is competent to stand trial. . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Id. at 2687 citing Parke v. Raley, 113 S.Ct. 517, 523 (1992) (The test is whether the waiver represents a voluntary and intelligent choice among the alternative courses of action open to the defendant), and Faretta, 422 U.S. at 835 (accused must "knowingly and intelligently" forego benefits of right to counsel).

In this case, as in others throughout the circuits before Godinez, the courts and the parties have repeatedly confounded and often interchanged the terms "competency to proceed" with "competency to

waive the right to counsel" and "knowing, intelligent and voluntary waiver of counsel". The misunderstanding may stem from Westbrook v. Arizona, 384 U.S. 150, 150 (1966), where the Supreme Court stated that a state trial court's finding that a defendant was "competent to stand trial" did not resolve the separate issue of his "competence to waive his constitutional right to the assistance of counsel" and proceed pro se. After Westbrook, it was unclear whether there was a different, more stringent test for "competency" required to waive certain rights, such as the right to counsel, than the test for competency to stand trial. The law within this circuit alone was conflicting. Compare Blackmon v. Armontrout, 875 F.2d 164, 166 (8th Cir.) cert. denied, 493 U.S. 939 (1989) and White Hawk v. Solem, 693 F.2d 825, 829-30, n.7 (8th Cir. 1982) cert. denied 460 U.S. 1054 (1983).

In Godinez, the Supreme Court finally settled the matter by explaining what it "had in mind in Westbrook":

> When we distinguished between "competence to stand trial" and "competence to waive the constitutional right to the assistance of counsel, we were using "competence to waive" as a shorthand for the "intelligent and competent waiver" requirement of Johnson v. Zerbst.

Godinez 113 S.Ct. 2688. The Court held that, "[i]n this sense this is a 'heightened' standard for pleading guilty and waiving the right to counsel, but it is not a heightened standard of competence." Id. at 2687 (emphasis in original). Godinez also reaffirmed the trial court's "serious and weighty responsibility . . . to

determine whether there is an intelligent and competent waiver by the accused". Id. at 2688.

The semantic chaos after Westbrook has additional relevance in this habeas corpus proceeding because a state court's determination of competency is a factual finding entitled to a presumption of correctness under §2254(d). Thompson, 116 S.Ct. at 459 citing Maggio v. Fulford, 462 U.S. 111, 117 (1983). However, a "waiver of the Sixth Amendment right to assistance of counsel is not a question of historical fact, but rather requires application of constitutional principles of facts." Thompson, 116 S.Ct. at 459 citing Brewer v. Williams, 430 U.S. 387, 404 and n.4 (1977). Although subsidiary factual findings must be presumed correct, the ultimate question requires an assessment of the totality of circumstances. See Miller v. Fenton, 474 U.S. 104 (1985). This is a matter for independent federal determination. Cuyler, 446 U.S. at 342; Miller, 474 U.S. at 112 (voluntariness of confession context).

The initial question here then, is whether the trial court or the Missouri Supreme Court made the sort of factual findings, evidenced by a written record, which this Court must accept in making the ultimate decision on the waiver of counsel. Sumner, 449 U.S. 539. A state court's resolution of an issue does not always include a finding of historical fact. "There is a fundamental difference between a ruling on a motion, essentially a legal determination, and a finding of fact." Elem v. Purkett, 64 F.3d 1195, 1200 (8th Cir. 1995) quoting Jones, 938 F.2d at 842. If there are such factual findings in the record, then the Court must examine whether one of the exceptions in §2254(d) negates the presumption of correctness. Finally, this

Court will determine the legal conclusion supported by the relevant facts.

The record in this case shows that the trial court made no factual findings when it consented to Petitioner's waiver of counsel. (Cir. Ct. Tr. at 42-90).[9] Rather, the trial judge expressed the mistaken belief that he was obliged to accept the waiver of counsel because Mr. Wilkins had been found competent to proceed. When notified that petitioner sought to waive counsel, the court stated:

> I suppose as long as this court finds that he is competent and able to conduct himself in a competent manner then he will, I guess, be permitted to pursue that avenue that he chooses.
>
> But, on the other hand, at his age and with his lack of legal training and schooling and considering the seriousness of the offense, this court feels that the availability of legal counsel is essential so that he can rely upon it, at least if he wants to, you see?

(Cir. Ct. Tr. at 45-46). See also Cir. Ct. Tr. at 62.

The trial court had just found that petitioner was competent to proceed when defense counsel Fred Duchardt and Mr. Wilkins announced that he wanted to

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[9]The Court will refer to the transcript of the arraignment, competency hearings, pleas of guilty and sentencing before Judge McFarland as the "Circuit Court Transcript" or "Cir. Ct. Tr."

waive counsel, plead guilty and seek the death penalty. (Cir. Ct. Tr. at 42-45). The court told petitioner many times that he had the right to counsel and the right to waive counsel. Acknowledging that petitioner was sixteen years old with only a ninth grade education and no legal knowledge or experience, the court stated that the circumstances of the case cautioned against the waiver of counsel. (Cir. Ct. Tr. at 43-44).[10] The trial judge urged Mr. Wilkins to accept counsel and instructed him to think about his decision for a few days. The court ordered Mr. Duchardt to remain available to answer any questions petitioner might have. (Cir. Ct. Tr. at 59, 67.)

The next hearing on the motion to waive counsel was held one week later. The court again cautioned petitioner about the dangers of proceeding pro se, and informed him about other constitutional rights, reciting a list including the right to confrontation, compulsory process, appeal and so forth. (Cir. Ct. Tr. at 69-79). The court explained that counsel could help protect those rights and expressly told Mr. Wilkins that he faced two possibilities for punishment upon conviction: the death penalty or life in prison without parole. (Cir. Ct. Tr. at 69-79). Petitioner continued to assert that he wanted to waive counsel. (Cir. Ct. Tr. at 70-79). Mr. Duchardt continued to asserts that he did not believe Mr. Wilkins was "competent to make those decisions." (Cir. Ct. Tr. at 41, 81). The court then provided

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[10]The prosecutor also argued that the assistance of counsel may be necessary, and urged to court to require defense counsel to stay available: "We simply believe with the court that there may be some matters where assistance or advice or counsel may be necessary". (Cir. Ct. Tr. at 62).

petitioner with waiver of counsel forms and accepted the waiver, but again advised petitioner to reconsider. (Cir. Ct. Tr. at 83-88, 94-95).

Although the trial court strongly encouraged petitioner to accept the services of counsel, the circumstances of this case demanded more. The Constitution required the trial court to consider the "background and experience" of Mr. Wilkins, who at the time was a juvenile with a long history of institutionalization for mental disorders and suicide attempts. Here, as in Von Moltke, the judge did not make a "penetrating and comprehensive" examination of all the circumstances or "investigate as long and thoroughly" as the circumstances of this case demanded to determine if Mr. Wilkins actually made a knowing, intelligent and voluntary waiver. Von Moltke, 332 U.S. at 723-724.

The omission is significant in this case. Petitioner was a sixteen year-old boy with less than a ninth grade education when he waived his right to counsel, entered the guilty plea and was sentenced to death. He had lived in mental institutions since he was ten. His background before being institutionalized included severe beatings and abuse by his mother and her live-in boyfriends. Child care frequently consisted of being locked alone in a room for hours without toilet facilities. (Cir. Ct. Tr. at 66, 357, 528-534, 358). The mother regularly used illegal drugs. An uncle, with her permission, gave petitioner marijuana and other drugs since he was only six years old "as a joke". (Cir. Ct. Tr. at 523-532).

At Tri-County Mental Health Center in 1979, Psychologist Robert Urie, Ph.D. described petitioner,

then age ten, as "a severely depressed boy with homicidal and suicidal ideation", "borderline thought disorder" and "emotional neglect." (Exhibit 7). Robert Walker, M.D., a psychiatrist, also reported then that he was at "serious risk" of becoming "homicidal and suicidal". (Exhibit 7).

The state court record included accounts from Butterfield Youth Ranch from 1980-1983, where petitioner was institutionalized from age eleven to fourteen. Those records documented bizarre behavior, depression, hallucinations and the mother's lack of interest. (Exhibit 8). In 1982, psychiatrist James Chappel, M.D., reported that petitioner showed "bizarre behaviors, especially when stressed" and possible schizophrenia. (Exhibit 8). Dr. Chappel feared that with stress, petitioner "would decompensate". (Exhibit 8 at 42, 539-545, 793-794).

In 1983 at Crittenton Psychiatric Center, Michael Harty, Ph.D., a psychologist, and Huseni Poonawala, M.D., the treating psychiatrist, predicted that petitioner would have a "psychotic breakdown" and become "violent or self-destructive". (Exhibit 5). By age 16 and at the time of this homicide, petitioner was living in a public park with other troubled teenagers, taking drugs and drinking excessively. (Cir. Ct. Tr. at 540-542).

Immediately before petitioner announced his waiver, psychiatrist Dr. William Logan had testified at the competency hearing that Mr. Wilkins had emotional impairments that caused him to act against his own best interests and "could interfere with his decision making process at certain critical points." (Cir. Ct. Tr. at 22). Dr. Logan had explained that petitioner was very impulsive, had not learned "how to use his mind to

make rational common sense decisions", and that "when it comes to making critical decisions, he's very easily frustrated and prone to give out and just take the quick, easy solution primarily based on how he feels and not on what he thinks or what might be the wisest course of action". (Cir. Ct. Tr. at 23-25).

Instead of further exploring the circumstances in light of this background, the trial court's inquiry here consisted almost entirely of leading questions, recited in a manner directed more toward making a record than meaningfully probing whether the waiver was a "voluntary and intelligent choice among the alternative courses of action." Schone, 15 F.3d at 788-789. Most of Mr. Wilkins' responses are simply "yes" or "no" answers, as if on cross-examination. (Cir. Ct. Tr. at 75-89).[11] The court's extensive use of leading questions on the record and the lack of any reference to his mental disorders provides no fair support for the conclusion that the waiver was intelligent and voluntary. Mental illness is a factor the trial court must consider when ruling on the validity of a waiver. E.g., Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972).

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[11]At the arraignment on October 17, 1985, petitioner said only two words ("yes sir") and the hearing was very brief. (Cir. Ct. Tr. at 3-5). At the competency hearing on April 16, 1986, Mr. Wilkins said nothing. Id. at 6-15. Petitioner then stated that he wanted to waive counsel. Although the court questioned him for several minutes, petitioner's responses were very limited. In the Hearing on Waiver of Counsel, on April 23, 1986, the court asked only a series of generic standard leading questions. petitioner, answered all questions with "yes", "no" or a nod. Id. at 69-96.

The Missouri Supreme Court also erroneously equated "competency to proceed" with the requirements for a waiver of the constitutional right to counsel. In the opinion on the mandatory statutory direct review of the conviction and sentence of death under Mo. Rev. Stat. §565.035, the court states that "any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of Miranda" and that "juveniles may validly waive the right to counsel". State v. Wilkins, 736 S.W.2d 409, 415 (Mo. 1987). This legal conclusion sets forth no finding of fact entitled to a presumption of correctness. Thompson, 116 S.Ct. at 459; Brewer, 430 U.S. at 404; Cuyler, 446 U.S. at 342.

The Missouri Supreme Court did make some factual findings on the statutory direct review which are entitled to a presumption of correctness under §2254(d). None of those findings, however, require the legal conclusion that Mr. Wilkins' waiver of counsel was knowing, intelligent and voluntary. The court found that the trial judge tried to dissuade petitioner from waiving counsel and had "admonished" petitioner to "talk to those whom he trusted and who could advise him about his chosen course"[12] and stated that the judge had urged petitioner to change his mind. Wilkins, 736 S.W.2d at 411-413. This finding, however, relates only to the trial court's recommendation. It does not compel the conclusion that Mr. Wilkins intelligently and

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[12]The record also shows that petitioner did not talk to anyone else about the decision to waive counsel. When the trial judge asked petitioner if he had consulted with anyone about that, Mr. Wilkins replied "There's nobody else, nobody else who has a hand in my decision, your honor." (Cir. Ct. Tr. at 75).

voluntarily waived his rights. "The ultimate test for whether there has been a valid waiver of the right to counsel is not the trial court's advice, but rather the defendant's understanding." Cash, 47 F.3d at 1088. A detailed admonition by the trial court on the record does not necessarily mean that the defendant acted knowingly, intelligently and voluntarily.

Moreover, the Missouri Supreme Court's appointment of counsel for Mr. Wilkins on the direct review and order for additional briefing and oral argument is consistent only with a finding that Petitioner validly did not intelligently and voluntarily waive his right to counsel. As outlined above, that court had initially appointed amicus counsel to brief issues and appear at arguments. However, when petitioner asked to waive amicus counsel on appeal, the court ordered Dr. Sam Parwatikar to examine him regarding his "competence to waive his right to counsel". (Exhibit 32).[13] After Dr. Parwatikar's evaluation, which included a review of all prior records and an extensive personal interview, he reported back to the court that Mr. Wilkins had mental

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[13]Again, the language has caused confusion. Dr. Parwatikar responded in the same terms. However, he explained to this Court that he interpreted the order as asking whether petitioner's waiver of counsel was knowing, intelligent and voluntary. He determined it was not. Dr. Parwatikar testified that petitioner's decision to waive counsel was not a rational choice because his reasoning process was irrational. Dr. Parwatikar further noted that petitioner's mental disorders made him less capable that other sixteen year old boys in making intelligent and voluntary decisions. (§2254 Hrg. Tr. 1-30-96 at 19).

disorders that "affect his rational reasoning and impair his behavior". Dr. Parwatikar concluded that petitioner was "not competent to waive his constitutional right to counsel." (Exhibit 13 at 16).

After receiving Dr. Parwatikar's report, the Missouri Supreme Court appointed counsel to represent Mr. Wilkins on appeal and ordered supplemental briefs and argument. (Order of Mo. Sup. Ct., Jan. 26, 1987). The court's opinion on direct appeal refers to Mr. Wilkins request to waive counsel, its order for the evaluation from the Department of Mental health and their subsequent appointment of counsel, but neglects to set forth the findings of Dr. Parwatikar that prompted the court to refuse petitioner's request and to appoint counsel. Wilkins, 736 S.W.2d at 411. The court's actions, however, constitute a findings in accord with Dr. Parwatikar's report: that the waiver of counsel was not intelligent and voluntary. See e.g., Parker v. Dugger, 498 U.S. 308, 316 (1991).

On the collateral review under Mo.R.Crim.P. 24.035, the state postconviction court did not make any findings binding on this Court.[14] The postconviction court listed several factual findings that support petitioner's competency to proceed, but that issue is not before this Court. The court's conclusion that the waiver of counsel was valid was again based on the erroneous legal view that a determination of

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[14]The Court will refer to the Findings and Conclusions by the trial court on the motion for postconviction relief under Mo.R.Crim.P. 24.035 as R.24.035 Order. The transcript from the evidentiary hearing on that motion will be designated R.24.035 Tr.

competency necessarily includes a valid waiver of the right to counsel. R.24.035 Order at 5-9. The only part of the court's order that addresses the waiver of counsel states:

> The court concludes that the finding of competency of movant to proceed entailed the ability to waive certain rights and to make decision necessary for the disposition of the case including the decision to enter plea of guilty and under the circumstances of this case to waive counsel and proceed pro se. The court also concludes a review of all the evidence shows that movant knowingly, voluntarily, and intelligently, and competently waived his right to counsel. The court further concludes that movant suffered no deprivation under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution.
>
> Court further concludes that no prejudice resulted to movant because of his waiver of counsel. The court concludes that movant is not entitled to relief because of his change of feeling regarding the death penalty.
>
> Court concludes movant was mentally competent to proceed as his own counsel.

R.24.035 Order at 9-10. This ruling is a legal determination not compelled by any findings of historical fact, and thus is not entitled to a presumption of

correctness. See Elem, 64 F.3d at 1200; Jones, 938 F.2d at 842.

The state postconviction court made no reference to extensive evidence regarding the background of petitioner, a necessary consideration in determining whether his waiver of counsel was knowing, intelligent and voluntary. Von Moltke, 332 U.S. at 723-724; Johnson, 304 U.S. at 464. In addition to the mental health professionals who examined and treated petitioner before the crime, other mental health experts examined him and testified in the state court that he was "severely disturbed".

Dr. Logan testified at the state evidentiary hearing that petitioner's lifetime without affection and nurturance had caused a "profound developmental arrest", severe mental disturbances and that he had attempted suicide several times. (Exhibit 14 and Cir. Ct. Tr. 467-472, 511). Dr. Logan affirmed at this Court's hearing that petitioner was extremely disturbed and immature at age sixteen. His opinion is that petitioner did not voluntarily or intelligently waive his right to counsel and that he was strongly affected by "internal coercion". (§2254 Hrg. Tr. at 21-23).

Dr. Dorothy Lewis, a psychiatrist, testified in the state court that Mr. Wilkins had a strong family history of psychotic illnesses, had hallucinations and was paranoid. This was consistent with an earlier diagnosis of "childhood psychosis". (Cir. Ct. Tr. at 24-26, 32-75). Dr. Lewis stated that petitioner's "paranoid orientation . . . played a major role in his dismissing his attorney." (Cir. Ct. Tr. at 28).

Dr. William O'Connor, a clinical psychologist, agreed that petitioner was "probably psychotic". (Cir. Ct. Tr. at 139-170). Dr. Jonathan Pincus, a neurologist, confirmed an earlier 1982 diagnosis of schizoaffective disorder. (Cir. Ct. Tr. at 319-327).

It is puzzling and inexplicable why the state court did not make any findings or address whether petitioner's disturbing background of mental serious disorders had any bearing on his waiver of counsel and guilty plea. The state court's only reference to the hearing was the conclusion that "the court further finds the testimony of the doctors relied upon by movant to be unpersuasive and can find no basis for disturbing the court's prior findings of movant's competency." R. 24.035 Order at 9.[15]

After a careful examination of the record as a whole, this Court concludes that the finding is not entitled to a presumption of correctness because it does not resolve the factual dispute and is not fairly supported by the record. §2254(d). The trial court does not explain which doctors it found to be "unpersuasive" or why. The judge does not set out whether he believed that any or all of the doctors were mistaken, lying or whether he just believed their testimony was irrelevant in light of his mistaken view of the law. The court did not make an credibility determination and did not refer to the substance of any expert's testimony.

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[15]The express wording of the order refers only to competency, but the court made the finding under "Point III" of the order, which purports to address the waiver of counsel. See R. 24.035 Order at 5-10.

Even more important, the trial court failed to even mention that Dr. Mandracchia, a witness for the state, testified that petitioner did not voluntarily and intelligently waive his right to counsel or plead guilty. (Exhibit 33 and Cir. Ct. Tr. 891-904). Although the court made findings that Dr. Mandracchia believed petitioner was competent to stand trial, it did not refer to his testimony about the waiver of counsel and guilty plea. (R.24.035 Order at 12-13). The exclusion is conspicuous because the trial court, at the state's request, had expressly ordered Dr. Mandracchia to conduct an additional examination to determine whether petitioner's waiver of counsel, guilty plea and waiver of mitigation were made "knowingly, voluntarily and intelligently". (Exhibit 35).

After examining petitioner as directed, Dr. Mandracchia reported:

> 1. In the opinion of this examiner, the Movant's waiver of counsel was made knowingly but not voluntarily or intelligently.
>
> 2. In the opinion of the examiner, the Movant's plea of guilty and waiver of trial by jury was made knowingly but not voluntarily or intelligently; therefore, the Movant is not viewed as having been competent to make such a decision.
>
> 3. In the opinion of the examiner, the Movant's waiver of his right to offer evidence in mitigation of punishment was made knowingly but not voluntarily or intelligently; therefore, the movant is

> viewed as not having been competent to have made such a decision.

(Exhibit 33 at 5). Dr. Mandracchia further explained the reasons for his opinions at the Rule 24.035 hearing, stating that petitioner's reasoning in making the decision was seriously defective, that he did not consider alternative options and did not reach his decision in a logical fashion. (Cir. Ct. Tr. at 891-904). The Missouri Supreme Court did not address Dr. Mandracchia's report. State court findings are not supported by the record as a whole if the court simply ignores or omits crucial evidence. See e.g., Walker v. Solem, 648 F.2d 1188, 1191 (8th Cir. 1981).

In this Court's hearing, Dr. Mandracchia credibly and confidentially testified to his belief that petitioner's waiver of counsel and guilty plea were not voluntary or intelligent. (§2254 Hrg. Tr. on 1-5-96 at 50, 70-77). He explained that he reached his conclusion after consulting with other professionals and considering several factors, psychiatric records, interviews with petitioner, review of all court transcripts and discussions with Mr. Duchardt. (Id. at 74). Dr. Mandracchia testified that it was petitioner's process in making the decision, rather than the decision itself, that was not intelligent and voluntary. Petitioner was obsessed with getting the death penalty and did not explore or consider any other options. (Id. at 51). Dr. Mandracchia explained that although some sixteen year old boys might be able to voluntarily and intelligently waive such rights, petitioner did not. Id. at 73, 76-77. The record indicates that the state courts gave inadequate weight in this case to petitioner's young age at the time of the waiver. Dr. Mandracchia's findings are credible and relevant to the law. See Von Moltke,

332 U.S. at 723-724; Young, 892 F.2d at 1351. The Missouri Supreme Court's did not base its ruling on the appeal of the postconviction motion on any facts which are entitled to deference. As on the statutory proportionality review, the court did make some factual findings entitled to a presumption of correctness, but none that support its conclusion. The Missouri Supreme Court again stated that the trial judge had discouraged petitioner from waiving counsel and that petitioner himself had told the court that he was competent. Wilkins v. State, 802 S.W.2d 491, 494-496 (Mo. 1991). The court found that petitioner had a ninth grade education and "average intelligence", and had "demonstrated a credible level of competence in handling his case". Id. at 501. The court also noted that "considerable portions of defendant's juvenile records offered by the State were kept out by the sustained objections of the defendant himself." Id. at 496.

While there is a presumption of correctness to historical facts such as the court's finding that petitioner had only a ninth grade education and average intelligence, it is hard to appreciate how this shows his waiver was knowing, intelligent and voluntary. The finding regarding his "competence in handling his case" is not fairly supported by the record. Petitioner never really "handled his case". He waived counsel, entered a guilty plea, asked for the death penalty, waived evidence in mitigation, and was sentenced to death. The excluded evidence from the juvenile records mentioned by the court was proof of Petitioner's serious psychiatric history as a child. (Cir. Ct. Tr. at 237).

Other findings are not fairly supported in the record. Contrary to the Missouri Supreme Court's

description, Wilkins, 802 S.W.2d at 502, the hearing court did not make any credibility determinations or state that Dr. Mandracchia's testimony was "unpersuasive". The motion court only referred to the "doctors relied on" by petitioner. (R. 24.035 Order at 9). Dr. Mandracchia was the state's witness.

Even though the trial court made no factual findings, the Missouri Supreme Court assumed the trial judge's conclusion could not be wrong:

> In the protracted proceedings hereinbefore discussed, Judge McFarland perhaps more than any person was favorably positioned to understand defendant and evaluate the evidence. He had ample opportunity to observe the defendant and learn the innermost reason for his decision to waive counsel. This observation and oral examination of the defendant could not be ignored and was necessarily taken into account when assessing the competency of a defendant to waive counsel.

Wilkins, 802 S.W.2d at 501. The court's account of the trial judge's "many hours of counseling and conversations" is contradicted by the record and does not resolve the waiver of counsel issue. The trial court asked very few questions that could not be answered with a "yes" or "no". Neither state court considered petitioner's background or the unanimous opinion of all mental health professionals that the waiver was not

intelligent and voluntary.[16] Further, the Missouri Supreme Court's resolution of the issue repeatedly refers back to Judge McFarland's determination that petitioner was competent to proceed. However, at the time that the trial court made that decision, petitioner had uttered only two words in the court's presence.[17]

The Missouri Supreme Court's most tenuous statement is that "though defendant did not renounce his waiver of counsel, he manifested his cunning, availing himself of the services of "standby" counsel when it met his purpose." Id. at 502. Although the trial court had insisted that Mr. Duchardt remain available as "standby counsel", he did not provide any legal advice or assistance to petitioner. (Cir. Ct. Tr. at 60-69, 81, 161). The designation was artificial. Mr. Duchardt objected in the state court and testified in this Court that he was no more than a reference book that remained on the shelf. (§2254 Hrg. Tr. at 87).

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[16]This Court has found but one passage in the state court record where the trial court asked petitioner to explain the reasons why he wanted to be executed. (See Cir. Ct. Tr. at 296-97). Petitioner's answer does not indicate an awareness of available defenses that might have resulted in a sentence where he would be eligible for parole at some time. Rather, Mr. Wilkins' response is similar to his statements during interviews with Dr. Parwatikar and Dr. Mandracchia where he gives contradictory and inconsistent explanations for his decision.

[17]"Q. (by the court): Are you Heath Wilkins?
A. (by petitioner): Yes, sir.
(Cir. Ct. Tr. at 3).

The ultimate question of waiver is an issue of federal law. For these reasons, and based on the record as whole, this Court concludes that petitioner did not knowingly, voluntarily and intelligently waive his right to counsel.

II. Guilty Plea and Waiver of Mitigation

Analogous to the waiver of counsel claim, Petitioner also asserts that his guilty plea and waiver of mitigation evidence were not knowing, intelligent and voluntary. The State argued that the claim is procedurally barred and that the state court's finding is entitled to a presumption of correctness.

A. Procedural Bar

Petitioner fairly presented this claim to the state postconviction court and the Missouri Supreme Court with factual support and extensive briefs citing to Westbrook v. Arizona, 384 U.S. 150 and Von Moltke, 332 U.S. 708, as outlined above, and Boykin v. Alabama, 398 U.S. 238 (1969), Brady v. United States, 397 U.S. 742 (1970) (voluntariness of guilty plea), as well as Lockett v. Ohio, 438 U.S. 586 (1986) and Eddings v. Oklahoma, 455 U.S. 104 (1982) (mitigating evidence). There is no procedural bar to this Court's review of the merits. Further, the state courts' conclusion is not entitled to a presumption of correctness under §2254(d). This is a mixed question of federal law and fact. Cuyler v. Sullivan, 446 U.S. at 342.

B. Merits

The Unites States Supreme Court has repeatedly pronounced that in order to satisfy the dictates of due process, a plea of guilty must be a knowing, intelligent and voluntary act. E.g. Brady v. United States, 397 U.S. at 748. As with a waiver of counsel, the resolution whether the plea was intelligently made depends on the particular facts and circumstances of each case. See Johnson, 304 U.S. at 463. If petitioner's waiver of counsel was not knowing and intelligent, then the guilty plea entered without counsel also must be invalid. Arsenault v. Massachusetts, 393 U.S. 5 (1968). However, the court will address this claim independently.

Under Boykin v. Alabama, 395 U.S. at 243-44, the trial court must undertake a factual inquiry to determine if the plea is voluntary and made with an understanding of the nature of the charge and consequences of the plea. The Boykin Court admonished state trial courts that the prerequisites of a valid waiver of constitutional rights must be "spread on the record." A federal court will not presume from an incomplete or silent record that there has been a valid waiver of constitution rights:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot assume a waiver of these three important rights from a silent record.

Id. at 243 (footnote and citations omitted).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970). The trial court must establish on the record that the defendant understands all elements of the charges, including the required mental state, and the possible ranges of punishment. Henderson v. Morgan, 426 U.S. 637 (1976); Nash v. Israel, 707 F.2d 298 (7th Cir. 1983). [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Boykin, 395 U.S. at 243, n.5.

A guilty plea can be involuntary not only because the defendant doesn't understand the nature of the right he is surrendering, Johnson v. Zerbst, 304 U.S. 458, 464-65, but also because he has an incomplete understanding of the charge. Smith v. O'Grady, 312 U.S. 329, 334. "Evidence of guilt establishes a factual basis for the plea, not that the defendant understand the law in relation to the facts." Gregory v. Solem, 774 F.2d 309, 314 8th Cir. 1985) quoting Nash, 707 F.2d at 303, n.8.

The record does not show that petitioner knew or understood the specific elements of the charges he faced or all his "alternative courses of action". There was no discussion of the lesser included offenses of second degree murder or manslaughter. The trial court never explained the different degrees of homicide under Missouri law and the difference in punishment.

Mo. Rev. Stat. §565.020 (1984) provides that a person commits the crimes of murder in the first degree if he "knowingly causes the death of another person after deliberation on the matter." The only possible punishments are death and life in prison without the possibility of parole. Mo. Rev. Stat. §565.032. Second degree murder, which carries a parolable sentence, does not include "deliberation". §565.021; State v. Jackson, 511 S.W.2d 771 (Mo. 1974). Under Missouri law, deliberation means that the defendant acted after reflection, "in a cool frame of mind." State v. Shaw, 569 S.W.2d 375, 377 (Mo. App. 1978). If premeditation and malice are shown, but not deliberation, the offense is murder in the second degree. State v. Ayers, 470 S.W.2d 534 (Mo. 1971).

The record here does not show that Petitioner understood the mental element of the crime charged or the defenses he would relinquish by pleading guilty. The word "deliberation" or its legal equivalent was never used when he entered his guilty plea. (Cir. Ct. Tr. at 104-167). The only words used in relation to mental states were "premeditated" and "knowingly" -- terms that describe the mental state for second degree murder under Missouri law. (Cir. Ct. Tr. at 125). Yet Mr. Wilkins entered a plea of guilty to first degree murder.

Moreover, the trial court expressly told Mr. Wilkins that there were only two potential punishment options: the death penalty and life in prison without parole. (Cir. Ct. Tr. at 77). The record does not establish that petitioner knew, or was ever told, that at a trial, an attorney could present a "diminished responsibility" defense that might result in a conviction

on the lesser included offense of second degree murder and receive a parolable sentence.[18]

The trial judge's constitutional duty to establish on the record the defendant's understanding of a charge with a guilty plea does not depend on whether the charge is complex or simple. However, the trial judge must be even more solicitous in fulfilling this duty when the charge is not readily understandable by a layman." Nash, 707 F.2d at 303, n.6.

Respondent argues that petitioner must have understood about the lesser included option of second degree murder and the diminished responsibility defense because in the hearing on the waiver of counsel Mr. Duchardt told the court that he had "attempted" to tell petitioner his options. This general statement, however, does not satisfy the requirements of Boykin or establish that petitioner understood the elements or difference between first degree murder and second degree murder and the different penalties. See Nash, 707 F.2d at 303.

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[18]The "diminished responsibility" defense permits a defendant to introduce evidence of a mental disease or defect to prove the absence of a particular mental element of the crime. E.g., State v. Anderson, 515 S.W.2d 534, 537 (Mo. 1974); See also Mo. Rev. Stat. §552.015.2. Unlike the defense of "not guilty by reason of insanity", the defendant accepts criminal responsibility for his conduct, but is convicted of a lesser degree of the crime because the mental defect prevented the defendant from forming the mental element of the higher degree of the crime. Id.

Mr. Duchardt never explicitly said what defenses they had discussed. He testified in this Court that he never explained the diminished responsibility defense to him. Mr. Duchardt was certain petitioner did not understand all the possible defenses. (§2254 Hrg. Tr. at 89-90, 93-94, 97, 105-106).[19] The postconviction court praised Mr. Duchardt's "talents and ability [and] also his dedication to his clients in the administration of justice." (R.24.035 Order at 11). Having heard Mr. Duchardt's testimony in the federal hearing and reviewed the record in its entirety, this Court concur's with that court's assessment of his professional integrity. This Court finds the testimony of Mr. Duchardt to be clear and convincing that petitioner's waiver of counsel and plea of guilty were made without an adequate understanding of the charges against him and the available defenses.

Although the trial court asked petitioner whether he understood the rights he was waiving, the judge did not ask him to say what he thought these defenses were. The petitioner's own conclusory statement that he was making an intelligent and voluntary plea is directly contradicted by the record. See Gonzales v. Grammer, 848 F.2d 894, 900 (8th Cir. 1988).

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[19]Mr. Duchardt's testimony was apparently overlooked by the state courts. When asked at the postconviction hearing whether he viewed Mr. Wilkins' decision to dismiss counsel, plead guilty and seek the death penalty as a decision made after "an intelligent weighing of the alternatives", Mr. Duchardt replied: "I never have and I never will." (R.24.035 Hrg. Tr. at 642).

It was particularly important for petitioner to understand the option of a second degree murder conviction because there is much evidence to suggest that, due to his mental disorders, he may not have been capable of deliberation. Although Dr. Logan found that petitioner would be competent to assist an attorney at trial, he testified that petitioner could not deliberate. (Cir. Ct. Tr. at 511-512). Mr. Duchardt, a seasoned defense lawyer, described this case as a very defensible one on this issue of mental state. Indeed, all of petitioner's co-defendants entered pleas of guilty to lesser offenses and received parole-eligible sentences.

Further, the trial court's only inquiry into "voluntariness" during the guilty plea was a question whether petitioner had received any promises or threats. (Cir. Ct. Tr. at 104-165). But when petitioner reported that a guard had assaulted him that day, the court dismissed it without delving into the circumstances or effect of the incident:

Court: Now then, this guilty plea petition consists of 6 pages. One of the things in here, even though you've not signed it, it says question No. 18, "I do not have any complaints against any law enforcement officials concerning my treatment while in jail. I had sufficient food, water, medical care, and bedding and I was not mistreated by any inmate while in jail. There are no exceptions to any of these statements except," and you put yes there. . ." I suffered abuse verbally and physically, 10:40, May 9, 1986, before entering the court."

Petitioner: That is correct.

Court: Do you wish to tell the court more about that?

Petitioner: Yes, I do, your honor. I was proceeding to speak out of the holding cells that they have back here (indicates). And is was told to shut my mouth. And I made the statement as I have a right to speak. And I was told to shut my mouth. And then the officer, I'm not absolutely aware of the officer's name but it's the gentleman standing here at the end of the counter (indicates), went back in here to do his business. Well, he came back some time later and picked me up. And I asked him why he told me to shut my mouth. I said, "couldn't you have stated something like be cool or something like that?" And then I told him that he didn't have to come off to me that way. And he pushed me in my face up against the wall and told me that, you know, he can do whatever he wants or something along the lines of, you know, there's nothing I can do about it, he can do what he wants. And when I told him that wasn't so he said, he goes, "You're nothing but a bad assed murderer." And he made a statement, oh, yeah, he said, "What are you going to do about it?" And he was up in my face when this, you know, he did, he pushed me in my face against the wall and made a statement that I was a bad assed murderer. And then he asked me what I was going to do about it and I didn't say nothing. I just looked at him. And he was right up in my face. And he said, "I thought so," And then he left and we came in here.

Q: All right. Is that the extent of your complaints against your treatment, or about your treatment?

A. Verbally and physically, yeah.

Q: Do you have any other complaints about your treatment while in jail?

A: No.

Q: All right, now, I'll ask you this, as to this treatment that you've complained about, did that have anything to do with your decision to come in here today and waive your right to trial by jury and tell the court that you want to plead guilty?

A: Not that I'm aware of.

Q: Okay. Did you want to sign this petition to enter plea of guilty?

A: Yes, your Honor.

(Cir. Ct. Tr. at 118-120).

The assaulting officer remained in the courtroom throughout the plea and there were no further questions. Although the trial court did not explore this further, Dr. Logan testified that the incident would have intensified petitioner's decision to plead guilty by confirming that the future was hopeless with potential for further abuse. (§2254 Hrg. Tr. at 24).

The record does not establish that the guilty plea was intelligent and voluntary, as required by Boykin, 395 U.S. at 243. The circuit court's record, made with leading questions, does not show that petitioner entered the plea with an understanding of the elements and consequences of all charges and "the alternative courses of action" open to him. See Alford, 400 U.S. at 31. The inquiry did not comply with the court's duty to "investigate as long and as thoroughly as the circumstances of the case demand" in order to protect

petitioner from making an involuntary and unintelligent waiver. Von Moltke, 332 U.S. at 724. The petitioner has established on the record as a whole that the guilty plea was not valid. The conviction can not stand.

III. Juvenile Proceedings

Petitioner next claims that the procedures by which he was ordered to be tried as an adult violated due process because he was given inadequate notice of the certification hearing and because the juvenile court refused to order a mental evaluation. The state argues that the claim is procedurally barred and is not an issue for federal habeas review, but merely a challenge to state law procedures for certification of juveniles.

A. Procedural Bar

The state relies on the Missouri Supreme Court's holding that the claim was defaulted because petitioner did not challenge the certification in the state circuit court requesting dismissal of the information or seeking remand to the juvenile court. Wilkins, 802 S.W.2d at 496-97. A habeas petitioner's failure to comply with a state procedural requirement may bar federal review of the merits if the state bar is "independent and adequate", unless the petitioner shows "cause and prejudice" for the default or a fundamental miscarriage of justice. Wainwright v. Sykes, 433 U.S. 72 (1977). A state procedural rule is not adequate to bar federal relief if the petitioner was acting pro se at the time of the default and did not make a knowing and intelligent waiver of rights. See e.g., Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972). The Missouri rule barring a challenge to the certification procedures when a guilty

plea is entered in circuit court does not apply if the guilty plea was not valid. See State v. Simpson, 836 S.W.2d 75 (Mo. App. 1992). Whether a state procedural rule is adequate to bar federal review is an issue of federal law, to be decided by the federal Court. Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir. 1989). This Court will address the merits of the claim.

B. Merits

Petitioner's hearing in the juvenile court to determine whether he would stand trial as an adult was five days after his arrest. Counsel received notice of the specific charge and factual allegations less than forty eight hours before the hearing. Thus, petitioner argues that counsel had insufficient time to prepare. Although counsel was able to obtain some records from petitioner's juvenile file, he had little time for review or investigation. There were a number of psychiatric records in the file, which indicated a history of serious mental disturbances since age nine. Counsel learned later, however, that other important records were missing.[20] In light of this history, counsel requested the juvenile court to order a mental evaluation of petitioner before deciding whether to waive the juvenile court's jurisdiction, but the court refused. Petitioner contends that the lack of adequate notice and denial of the mental evaluation deprived him of a meaningful adversarial hearing.

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[20]Mr. Duchardt testified before this court that he had no time to prepare before the juvenile certification hearing and that the records he had been given were incomplete. (§2254 Hrg. Tr. at 79-80).

"It is clear beyond dispute that the waiver of [juvenile court] jurisdiction [to permit criminal prosecution as an adult] is a 'critically important' action determining vitally important statutory rights of the juvenile." Kent v. United States, 383 U.S. 541 (1966). Consistent with the serious nature of the proceeding, the Supreme Court has held that such hearings "must measure up to the essentials of due process and fair treatment". Id. at 560-563; see also In re Gault, 387 U.S. 1 (1967). The Gault Court ruled that under the due process clause, fundamental fairness requires that juveniles receive the benefits of essential constitutional provisions, including the right to counsel and proper notice. The mere appointment of counsel for the proceeding does not necessarily satisfy due process. The duty to assign counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Powell v. Alabama, 287 U.S. 45 (1932). The notice to counsel must be adequate to permit sufficient preparation as the particular case demands. See Geboy v. Gray, 471 U.S. 575 (1973).

The Supreme Court has also held that there is a due process right to the assistance of a psychiatric expert if a defendant's mental condition is a significant factor in the case. Ake v. Oklahoma, 470 U.S. 68 (1985). Dr. Logan has testified that if he had been able to evaluate petitioner before the proceeding, he would have advised the juvenile court that petitioner needed a specific type of intensive psychiatric therapy and hospitalization. The treatment could have been provided through the court. Dr. Logan would have refuted the testimony of witnesses from the Division of Youth Services who obviously did not understand the

scope and nature of petitioner's problems. (Cir. Ct. Tr. at 464-467).

The adequacy of notice and need for the mental evaluation are issues which implicate due process concerns. The portions of the juvenile file that were available revealed a significant history of mental problems which suggests the need for further evaluation. Given the seriousness of the charges and petitioner's history of mental illness, the notice to counsel does not seem sufficient to give petitioner the benefit of the adversarial process. See Lankford v. Idaho, 114 S.Ct. 1723, 1733 (1991).

However, in order for petitioner to prevail on this due process claim, he must prove that, under the totality of circumstances, the errors were so prejudicial they rendered the entire proceeding fundamentally unfair. See e.g., Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Petitioner has made no showing that the outcome of the juvenile proceeding would have been any different if counsel had been given additional time to prepare or if a mental evaluation had been ordered. There is no indication that the juvenile court would not have still waived its jurisdiction. Without such proof of prejudice, the claim must be denied.

IV. Conflict of Interest – Prosecutorial Misconduct

Petitioner next asserts that his right to due process of law was violated because the prosecutor, Larry Harmon, had previously represented him in a juvenile case, failed to disclose that prior representation to counsel or the court and used confidential information in prosecuting the case. The state argues that the issue is procedurally defaulted and without merit.

A. Procedural Bar

The Missouri Supreme Court denied this claim on the basis of a procedural bar, stating that the issue was not timely presented in petitioner's first motion for postconviction relief. Wilkins, 802 S.W.2d at 504. Petitioner did raise the issue in a second amended motion filed outside of the time limits in Rule 24.035, but the court refused to consider the merits, holding that the limitation period was mandatory and could not be extended. Id. citing White v. State, 779 S.W.2d 571, 572 (Mo. 1989).

A federal habeas court may consider the merits of a petitioner's procedurally defaulted claims if the petitioner establishes both cause for the prejudice from his default. Wainwright v. Sykes, 433 U.S. at 87; Engle v. Isaac, 456 U.S. 107, 126-130 (1982). To establish cause, petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with eh State procedural rule." Murray v. Carrier, 477 U.S. 478, 488-89 (1986). Proof that the factual basis for the claim was not reasonably available to counsel or that the interference by state officials made compliance impracticable are examples of such factors. Amadeo v. Zant, 486 U.S. 214, 222 (1988); Parkus v. Delo, 33 F.3d 933, 938 (8th Cir. 1994); Bliss v. Lockhart, 891 F.2d 1335, 1341 (8th Cir. 1990).

Petitioner has established cause for his default because the factual basis for his claim was not available to counsel at the time that the first amended postconviction motion was filed on August 30, 1988. Counsel learned for the first time on April 19, 1989 that Mr. Harman had represented petitioner in juvenile court proceedings. On that date, postconviction counsel

found an order from the Juvenile Court, dated 1979, committing petitioner to the Department of Mental Health for psychiatric treatment, which listed Mr. Harman as his attorney. Apparently there is no other record of Mr. Harman's representation because the Juvenile Court file and the Clay County Public Defender file had both been destroyed.

Mr. Harman did not disclose this conflict of interest to the court or to counsel, and counsel could not otherwise reasonably have known of the prosecutor's prior relationship with petitioner. The record shows that in August, 1985, Mr. Duchardt had asked the Western Missouri Mental Health Center for copies of all records on petitioner, but was told by a clerk on August 21, 1985 that none were available. Postconviction counsel began requesting files from the Mental Health Center shortly after being appointed in 1988, but no records were found until April 19, 1989, when a records supervisor searched in the basement files.

When postconviction counsel learned of Mr. Harman's prior involvement with petitioner, he immediately filed the second amended Rule 24.035 motion alleging that Mr. Harman's prosecution of his former client was a conflict of interest that violated due process. After the Missouri Supreme Court refused to consider the merits of the claim on the Rule 24.035 appeal, the issue was presented to that court in a Petition for Writ of Habeas Corpus filed under Missouri Supreme Court Rule 91, with supporting proof. Under these circumstances, factors external to the defense prevented the discovery of the only existing document showing Mr. Harman's prior representation. See Amadeo, 486 U.S. at 222; Parkus, 33 F.3d at 938.

Petitioner did all he could to exhaust the claim in the state court. Principals of comity and federalism are not offended. There is cause to overcome the procedural bar.

B. Merits

As a public defender in 1979, Mr. Harman represented petitioner, then age ten, on a burglary charge in the juvenile court. Petitioner's mental condition was a key issue in those proceedings. A number of confidential psychiatric reports were made which included sensitive personal data about petitioner and information about his attempt to poison his mother a year earlier. The records included opinions by mental health professionals that petitioner was severely depressed and had suicidal and homicidal impulses. The outcome of the 1979 matter was that Mr. Harman stipulated to petitioner's commitment to the Division of Mental Health.

Six years later, as the lead prosecutor on this case, Mr. Harman actively sought a conviction and the death penalty for his former client. There is no question that the prosecutor remembered the earlier representation. On August 14, 1985, the day before the juvenile certification hearing, Mr. Harman requested an advisory opinion on the matter from the Missouri Bar Advisory Committee.[21] The Committee's response, dated August 29, 1985, stated:

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[21]The exact content of Mr. Harman's letter to the Advisory Committee is not clear. The state has not provided a copy of the document to this Court.

> It is the opinion of the Advisory Committee that there would be no conflict of interest for you to prosecute a criminal case against an individual whom you represented in an unrelated juvenile court matter in 1979. This assumes that no information was obtained at the time of the earlier representation which would be used against the defendant in the course of this prosecution.

(Exhibit 23) (emphasis added). The state contends that this answer constitutes a finding that there was no conflict of interest and that the prosecutor violated no ethical rule. This Court is not convinced. The Committee's response is generic and does not refer to any specific circumstances in this case. Under the facts in the record as a whole, the assumption that the matters were "unrelated" or that information obtained in the earlier representation would not be used in the prosecution of Mr. Wilkins is refuted. It is presumed that an attorney received confidential information in the course of representing a client. United States v. Shepard, 675 F.2d 977 (8th Cir. 1982).

The Missouri disciplinary rules, also adopted in this federal district, restrict an attorney's employment adverse to a former client.[22] Rule 1.9 is derived from

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[22]Rule 1.9 provides:
Conflict of Interest: Former Client
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the

counsel's duty to preserve the confidences of his client in order to preserve the integrity of the adversary system. As a prosecutor, however, Mr. Harman also had additional ethical obligations. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." Young v. United States, 481 U.S. 787, 802 (1987) quoting Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association Model Code of Professional Responsibility (1982). See also Berger v. United States, 295 U.S. 78 (1938) and EC 5-15 (if there is a possible conflict of interest, lawyer "should resolve all doubts against the propriety of the representation"); EC 906 (lawyer has duty to avoid "not only professional impropriety but also the appearance of impropriety").

Concerns for potential misconduct in this setting are not merely speculative. In Young, 481 U.S. at 807, the Supreme Court noted that "an arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination whether there is an actual conflict of interest is therefore distinct from the determination whether that conflict results in any actual misconduct."

The question for this Court, however, is not whether the prosecutor's actions violated the ethical code. Habeas corpus relief is available only where

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former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

there are errors of constitutional magnitude. Cupp v. McNaughten, 414 U.S. 141, 146 (1973); Newlon v. Armontrout, 885 F.2d 1328, 1336 (8th Cir. 1989). Petitioner asserts that the prosecutor's failure to disclose his prior representation to the trial court or to counsel violated the due process protections of the United States Constitution.

It is well-settled that a fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 523 (1927). There is a constitutional violation of due process when an attorney represents a client and then participates in the prosecution of that client in the same matter or another matter with a substantial relationship to the first. See United States v. Schell, 775 F.2d 559, 566 (4th Cir. 1985); United States v. Wilson, 497 U.S. 602 (8th Cir. 1974); Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985). "The right to due process and a fair trial include the essential element that there is no unfair advantage to the prosecution by reason of a prior professional relationship between [the prosecutor] and a criminal defendant concerning the same or closely related matter." See State v. Boyd, 560 S.W.2d 296 (Mo. App. 1977).

The threshold question then is whether the prosecution for the murder of Nancy Allen had a substantial relationship to the juvenile court matter in 1979. The applicable test is that described in Arkansas v. Dean Foods Products Co., 605 F.2d 380 (8th Cir. 1979) overruled on other grounds in In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377, 378 (1980):

> The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action (where) the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.

Dean Foods, 605 F.2d at 383.

Under the law of this Circuit, "the attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Id. at 384. If there was a substantial relationship between the two matters, and if the prosecutor will be called on to use against his former client any confidential knowledge gained through their former association, then there is prejudice to the accused. Gajewski v. United States, 321 F.2d 261, 267 (8th Cir. 1963). Whether there is a "substantial relationship" involves a full consideration of the facts and circumstances in each case. See Dean Foods, 606 F.2d at 384.

Virtually every issue in this case involves questions of petitioner's mental disturbances. As outlined above, the juvenile certification, waiver of counsel, guilty plea and waiver of mitigation all involved concerns related to petitioner's mental condition. Mr. Harman had confidential knowledge of petitioner's psychological background through his former representation which resulted in commitment to a

mental institution. The Court finds that information was substantially related to the later prosecution. Mr. Harman had the discretion to seek or waive the death penalty, and that decision necessarily involved subjective assessments of petitioner's state of mind and mental health. In a matter of such grave importance, the prosecutor had a duty to disclose his prior representation so that appropriate actions could be taken to preserve the integrity of the proceedings.

This Court has found only one case where a prosecutor has sought the death penalty in a case against a former client that he had personally represented. State v. Stenger, 760 P.2d 357 (Wa. 1988), held that when the death penalty is sought, knowledge about the defendant's background disclosed in the earlier representation becomes "closely interwoven" with the capital case:

> This is because the death penalty is the ultimate punishment and, before the prosecuting attorney may ask imposition of the death penalty, the prosecuting attorney must have reason to believe that there are not sufficient mitigating circumstances to merit leniency . . . . In short, privileged information obtained by the prosecuting attorney when he was the defendant's counsel in the previous case could well work to the accused's disadvantage in this case where the death penalty was sought.

Id. at 360. The Stenger court disqualified the prosecutor. This Court agrees with the reasoning of Stenger. Here, as in Stenger, the capital murder case

prosecuted by the defendant's former lawyer was substantially related to the earlier case.

Mr. Harman also erred by seeking the death penalty, at least in part, on the basis of his own personal opinion that petitioner had no serious mental disturbance. At the sentencing proceeding, Mr. Harman stated:

> The state has attempted to be fair also, your honor, in the sense that we also listed what could be considered as mitigating circumstances, just the evidence touching on those.
>
> Whether or not the defendant was under a severe or substantial emotional disturbance at the time of the crime. We don't believe that that actually existed, but we did go into that with Dr. Logan.
>
> Another one, perhaps, was that we substantially, had substantially impaired capacity to appreciate the criminality of his conduct or the ability to conform his conduct to the requirements of the law.
>
> And we don't think that is a mitigating circumstance that is present in this case. But, we elicited the testimony so the court would have the benefit of both sides.

(Cir. Ct. Tr. at 293) (emphasis added).

A prosecutor's misconduct violates due process if the defendant was prejudiced by the prosecutor's

actions to the extent that the proceeding was fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Dodd v. Nix, 48 F.3d 1071, 1075 (8th Cir. 1995). The prosecutor's personal belief is not the proper basis for a sentence of death. See Newlon, 885 F.2d at 1336. This Court recognizes that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor". Smith v. Phillips, 455 U.S. 209, 218 (1982). However, fairness was compromised here.

Petitioner was prejudiced by Harman's failure to disclose his personal knowledge of petitioner's prior commitment to the department of mental health and the facts and circumstances underlying that disposition. This was relevant to the court's duty to preserve the adversarial proces and in accepting the guilty plea.

The prosecutor's conflict of interest presents a very serious issue. It seems incredulous to imagine a former defense attorney, privy at one time to the thought of a juvenile defendant so disturbed that he is committed to a mental institution, to then turn prosecutor and accuser seeking the death penalty for his former client without disclosing the relationship to the court and to counsel. This is particularly disturbing in this case because petitioner waived counsel, entered a guilty plea to a capital charge, waived mitigation and was sentenced to death. The presence of a former defense attorney and confidant at the opposing table would certainly inhibit a defendant from trusting his present counsel or taking counsel's assertions of confidentiality very seriously.

"A prosecutor acts in a quasi-judicial capacity, and he and those associated with him should represent public justice and stand indifferent as between the accused and any private interest. . . . An attorney cannot be permitted to assist in the prosecution of a case if, by reason of a professional relationship with the accused, he has acquired a knowledge of facts . . . which are closely interwoven withe [the issues in the case]." People v. Polonowski, 629 N.E.2d 1162, 1165 (Ill. App. 1994) quoting State v. Curry, 272 N.E.2d 669, 672 (Ill. App. 1971).

This is a structural defect which defies analysis by "harmless error standards". See Young, 481 U.S. at 809. Beyond a reasonable doubt, the entire conduct of the criminal proceeding was obviously affected by the conflict of interest caused by the prosecutor's prior representation and his nondisclosure. See Arizona v. Fulminante, 499 U.S. 279, 309 (1990); Chapman v. California, 386 U.S. 18 (1967). On this habeas review, the Court has cautiously considered whether the error had a substantial and injurious effect on the outcome of the case: petitioner's conviction and sentence of death. See Brecht v. Abrahamson, 113 S.Ct. 1710, 1714-1714 (1993). Having considered all facts and circumstances, including petitioner's juvenile history, background of abuse, mental disorders and institutionalization, the prosecutor's access to confidential information and failure to disclose the prior representation, petitioner's refusal of counsel and guilty plea, the Court finds that the error had a substantial and injurious effect on the outcome. See O'Neal v. McAninch, 115 S.Ct. 992, 994 (1995). The writ of habeas corpus will issue on this claim also.

V. Proportionality Review

Petitioner next alleges that the proportionality review conducted by the Missouri Supreme Court was constitutionally flawed in violation of the Eighth Amendment and the Due Process clause of the Fourteenth Amendment. The state responds that the claim does not present any federal constitutional concern.

It is clear that the Eighth Amendment does not require a state appellate court to determine whether a death sentence is proportional to that imposed in other cases. Pulley v. Harris, 465 U.S. 37 (1984). However, the holding of Pulley does not altogether settle the issues raised here. Although not mandated by the Constitution, Section 565.035 of the Missouri Revised Statutes (1986) does require that every death sentence must be reviewed by the Missouri Supreme Court to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." In Pulley, neither the state constitution nor any statute mandated this type of review.

This Court is mindful that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions". Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). However, the concern here is more than a matter of state law. In Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), the Supreme Court held that a state creates a liberty interest when it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections. "[A]n arbitrary deprivation of such entitlement may create an independent federal constitutional violation". Toney v. Gammon, 79 F.3d

693, 699 (8th Cir. 1996) quoting Hicks, 447 U.S. at 346. The whole purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2342 (1994).

This Court is not concerned with the general procedures established for the Missouri Supreme Court's statutory review of death sentences. In that regard, the Eight Circuit has determined that there is "no unfairness or deprivation of due process". Murray v. Delo, 34 F.3d at 1377. The question here, rather, is whether petitioner sustained an arbitrary deprivation of a liberty interest in this particular case.

The Court finds that Mr. Wilkins had a substantial and legitimate expectation that the Missouri Supreme Court's proportionality review would be a thorough and meaningful one, with full consideration of "whether the sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of evidence and the defendant." §565.035. However, the record shows that the court did not consider certain facts necessary for an adequate review in this case.

The Missouri Supreme Court focused only on the aggravating circumstances of the crime and the strength of the evidence of guilt. The court did not appraise the relevance of petitioner's young age in the review. There is no mention that Mr. Wilkins had been committed to the Department of Mental Health at age ten, had been institutionalized for more than three years and that psychiatric and treatment records documented severe emotional disturbances. This evidence directly supported at least two statutory mitigating

circumstances that commanded careful and full consideration. See Mo. Rev. Stat. §565.050. Further, the court gave no regard to the sentences of the other person involved in the homicide.[23]

Three justices dissented for these reasons, with Justice Donnelly writing to detail the factual omissions and law contrary to the court's conclusion:

> First, we consider age. In four capital cases involving youths of comparable age, a life sentence was imposed. State v. Greathouse, 627 S.W.2d 592 (Mo. 1982) (defendant age seventeen); State v. Allen, 710 S.W.2d 912 (Mo. App. 1986) (defendant age sixteen): State v. White, 694 S.W.2d 802 (Mo. App. 1985) (defendant age seventeen); State v. Scott, 651 S.W.2d 199 (Mo. App. 1983) defendant age sixteen). Only one Missouri youth has been sentenced to die who was seventeen years or younger as of his crime. State v. Lashley, 667 S.W.2d 712 (Mo. banc) cert. denied, 469 U.S. 873 (1984).

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[23]Marge Filipiak received a suspended sentence and probation. Ray Thompson was sentenced to 15 years on a reduced charge of second degree murder. Patrick Stevens was sentenced to life imprisonment on the reduced charge of second murder and will be eligible for parole after he has served 15 years. The importance of this consideration has been stressed. See State v. Schneider, 736 S.W.2d 392, 405-06 (Mo. 1987) (J. Blackmar, dissenting).

Wilkins, 736 S.W.2d at 421 (Donnelly, J., dissenting). Justice Donnelly reviewed petitioner's history of mental and emotional disturbances, institutionalization, suicide attempts and history of drug use, citing from reports of the mental health professionals. He concluded:

> On these facts, considering defendant's age, and his significant cognitive-emotional disorder, and connected extensive drug abuse, we hold the sentence excessive and disproportionate.

Id. at 422. This Court agrees with the assessment of Justice Donnelly, which is supported in the record by clear and convincing evidence.

Although the United States Supreme Court does not require a state to do a proportionality comparison in every case, it is well established that the state court must provide a meaningful appellate review as an essential factor in protecting the arbitrary and capricious imposition of the death penalty. Parker v. Dugger, 498 U.S. 308 (1991); Clemmons v. Mississippi, 494 U.S. 738 (1990). The review by the Missouri Supreme Court, however, was not meaningful and resulted in an arbitrary deprivation that violated "petitioner's right to liberty is a denial of due process of law." Hicks, 447 U.S. at 346; Parker, 498 U.S. at 322. See also Vitek v. Jones, 445 U.S. 480, 488-89 (1980); Morrissey v. Brewer, 408 U.S. 471 (1972).

This conclusion does not create a new rule of law under Teague v. Lane, 489 U.S. 288 (1989). The rule of Hicks, holding that a state statute regarding criminal procedure may create a liberty interest triggering due process, was issued in 1980. Petitioner's

conviction was not final until 1989. Stanford v. Kentucky, 109 S.Ct. 2969 (1989). See Griffith v. Kentucky, 479 U.S. 314 (1987). There is no retroactivity bar under Teague.

VI. Aggravating Circumstances

Petitioner's last remaining claim is that his death sentence is cruel and unusual in violation of the Eighth Amendment because the aggravating circumstance "depravity of mind" is unconstitutionally vague. The state does not assert a procedural bar, but defends the issue on the merits.

The trial court sentenced petitioner to death after finding that two aggravating circumstances existed: first, that "the murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery" and second, that "the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman." (Cir. Ct. Tr. at 300-01).

Petitioner contends that the words "depravity of mind" are unconstitutionally vague in this case because the trial court did not specifically find "torture" and did not explain the basis of this finding. In support, petitioner relies on Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), and Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990).

The difference between this case and Godfrey, Maynard and Newlon, however, is that Mr. Wilkins was sentenced by the judge, not a jury. In Walton v. Arizona, 497 U.S. 639, 653 (1990), the Supreme Court

held that "trial judges are presumed to know the law and to apply it in making their decisions". This claim is denied.

Conclusion

For the reasons stated above, the Court hold that the petition for writ of habeas corpus will be conditionally granted. This conditional writ shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this Order.

(signature)

SCOTT O. WRIGHT
Senior United States District Judge

May 15, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

HEATH A. WILKINS,
Petitioner,

JUDGMENT IN A CIVIL CASE

v.

MICHAEL BOWERSOX,
Respondent. Case Number 91-0861-CV-W-5

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus will be conditionally granted. This conditional writ shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this order.

May 15, 1996 — *Date*

R.F. Connor — *Clerk*

(signature)
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS,	)
	)
Petitioner,	)
	)
v.	)No. 91-0861-CV-W-5
	)
PAUL K. DELO	)
	)
Respondent.	)
	)

ORDER

Before the Court are respondent's Motion to Preclude Consideration of Evidence Adduced Before This Court on Petition for Writ of Habeas Corpus, and petitioner's Motion to Expand the Record.

Motion to Preclude Consideration of Evidence

The basis of respondent's motion is the Antiterrorism and Effective Death Penalty Act of 1996, which was signed into law on April 26, 1996, four months after the evidentiary hearing in this case. Respondent contends that the evidence presented at the hearing should not be considered pursuant to § 2254, which states:

> If the appellant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

evidentiary hearing on the claim unless the appellant shows that --

(A) the claim relies on --

- (i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the use of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. sec. 2254 (e) (2) (as amended April 24, 1996).

Respondent argues that this provision applies retroactively to this case because the statute implicates only a new procedural rule, citing Landgraf v. USI Film Products, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). However, that case does not support respondent's position. Landgraf, which involved the retroactivity of compensatory and punitive damage provisions of the Civil Rights Act of 1991, held that there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 114

S.Ct. at 1497. The Court adopted the following analysis to determine whether a statute is to be applied retroactively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

114 S.Ct. at 1505. The intent of Congress is therefore the starting point for this Court's resolution of the issue.

It is apparent that Congress did not intend for § 2254 (e) to apply retroactively to pending cases. Although some provisions of the Antiterrorism and Effective Death Penalty Act of 1996 do set forth dates or events upon which they become effective, Congress did not specify an effective date for § 2254 (e). Title I of the Act, designated "Habeas Corpus Reform," contains two sets of revisions to the statutes governing

habeas corpus cases. Those in sections 101 to 106 modify the statutory provisions which apply to all cases brought under the statute, including § 2254 (e). The second set of provisions, section 107 of Subtitle A, designated "Chapter 154--Special Habeas Corpus Procedures in Capital Cases," applies only to capital cases. This section provides for the expedited disposition of habeas corpus actions brought by prisoners under sentence of death, and applies only if a state establishes criteria for the appointment and compensation of competent counsel in state postconviction proceedings.

The statute provides that "Chapter 154 of title 28, United States Code (as amended by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act," but there is no such language regarding §§ 101-106. Thus, it appears that Congress contemplated the issue of retroactivity, but limited retroactive application only to the expedited death penalty provisions.

Respondent's argument that the amendments affect only a "procedural rule" does not resolve the question of retroactivity. In Landgraf, the Court provided more concrete criteria for determining whether legislation should apply retroactively:

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence

> would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the procedural posture of the particular case. [citations omitted]. Contrary to Justice Scalia's suggestion, . . . , we do not restrict the presumption against statutory retroactivity to cases involving "vested rights." . . . Nor do we suggest that concerns about retroactivity have no application to procedural rules.

114 S. Ct. at 1499, n. 29. A statute would upset valid reliance interests if it "impos[ed] new burdens on a person after the fact," 114 S. Ct. at 1500. The relevant question is whether the statute would "take away or impair vested rights, or create a new obligation, impose a new duty, or attach a new disability?" 114 S. Ct. at 1499. Under respondent's argument, the statute would increase petitioner's burden of proof and add new obligations on habeas petitioners during the state postconviction process. Given the procedural posture of this case, this Court will not interpret the statute to limit its consideration of the evidence presented at the hearing.

Even if the new statute did apply retroactively, the restrictions on federal evidentiary hearings in § 2254 (e) (2) are triggered only "[i]f the *applicant* has failed to develop the factual basis of a claim in State court proceedings. . . " In this case, petitioner did not fail to do so. The evidence was developed in state court. However, the Missouri Courts made no findings on

several issues, and other findings are not supported by the record as a whole.

28 U.S.C. § 2241 leaves intact the power and duty of federal courts to issue writs of habeas corpus. Indeed, "[a] 'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988), citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986).

Petitioner has advanced meritorious claims, supported by substantial evidence presented in the state court, that his conviction and sentence were obtained in violation of the Constitution. This Court does not interpret any of the newly enacted provisions pertaining to habeas corpus as infringing on this Court's power and duty to adjudicate constitutional claims. Wright v. West, 112 S.Ct. 2482 (192). Where the state court fails to make findings of fact which adequately resolve the constitutional claims that are properly before it, the federal court's duty to adjudicate the claim includes the power to hear evidence. Townsend v. Sain, 372 U.S. 293, 312 (1963). Even under Townsend, a petitioner could forfeit the right to an evidentiary hearing in federal court if his failure to adequately develop material facts was the result of "inexcusable neglect." Id. at 317, citing Faye v. Noia, 372 U.S. 391, 438 (1963). The Court more recently articulated a less forgiving standard for prisoners seeking evidentiary hearings in federal court, requiring a habeas petitioner seeking to present evidence which he had failed to present to the state court to show "cause and prejudice" for his failure. Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

The new statute appears consistent with the direction the Court has taken--to conserve federal judicial resources, and require prisoners to fully develop the factual basis for their constitutional claims in the state court. However, just as Keeney v. Tamayo-Reyes modified Townsend, replacing the "deliberate by-pass" standard with the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), the statute restricting evidentiary hearings clearly is directed at heightening the standard for prisoners who, for whatever reason, by-pass the opportunity to develop facts in the state court. Because the statute limits its application to applicants who "fail to adequately develop the factual basis of a claim in state court proceedings," the principles of Townsend remain intact if the petitioner presented the factual basis of his claims in the state court.

Respondent's motion to preclude the consideration of evidence is denied.

Motion to Expand the Record

Petitioner has moved to expand the record and submitted Exhibits T-KK, inclusive, which have been referred to throughout these proceedings and in the state courts. This Court would abuse its discretion if it refused to consider briefs and pleadings filed in the state court, especially in light of respondent's numerous claims of procedural default. See Dobbs v. Zant, 506 U.S. 835 (1993) (per curiam). Petitioner's motion to expand the record with Exhibits T-KK, inclusive, is granted.

Accordingly, it is hereby

ORDERED that respondent's Motion to Preclude Evidence (Doc. #94) is denied. It is further

ORDERED that petitioner's motion to expand the record (doc. #95) is granted.

(signature)

Scott O. Wright
United State District Court
Judge

Dated: May 15, 1996.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Heath Allen Wilkins,	*	
	*	
Appellee,	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Re-
Michael Bowersox,	*	hearing En Banc
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 1998

Order Entered at the Direction of the Court:

(signature - Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH ALLEN WILKINS,	)
	)
Petitioner,	)
	)
vs.	)No. 91-0861-CV-W-5
	)
MICHAEL BOWERSOX	)
	)
Respondent.	)

ORDER

Before this Court is Petitioner Heath A. Wilkins' Motion to Set Aside Order Dated May 16, 1995, and Revised Motion to Dismiss Certain Claims in the Amended Petition. For the reasons set forth below, these motions will be granted.

I. Background

On May 8, 1992, Petitioner filed his First Amended Petition for Writ of Habeas Corpus, alleging thirteen claims for relief. After additional briefing by both parties, as ordered by this Court, Petitioner filed a Motion for Evidentiary Hearing, which the State opposed.[1] On May 16, 1995, this Court entered an

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[1] The original named respondent in this action was Paul Delo, who was Superintendent of the Potosi Correctional Center when the petition was filed. Since then, Michael Bowersox has replaced Mr.

Order conditionally granting the Writ of Habeas Corpus on one of Petitioner's claims on the basis of the record, without an evidentiary hearing. The Court also considered and denied one other claim, but the eleven remaining claims were not addressed. Judgement was entered on May 18, 1995. The State filed Motions to Alter or Amend the Judgment under Fed.R.Civ.P. 59(e) and to Stay the Order and Judgment, which this Court denied on June 16, 1995. After timely filing a notice of appeal, the State requested the Court of Appeals for the Eighth Circuit to remand the case to this Court for resolution of all remaining claims. The motion was granted on October 3, 1995.

After remand, Petitioner renewed his previous request for an evidentiary hearing. Over the State's objections, testimony was heard on January 5 and 30, 1996. Petitioner then filed his Motion to Set Aside the Order dated May 16, 1995, pursuant to Fed. R. Civ. P. 60(b). Post-Hearing Briefs were filed by both parties, and Petitioner moved to dismiss certain claims in the amended petition, with prejudice, paring back the number of claims from thirteen to five.

II. 60(b) Motion

Fed.R.Civ.P. 60(b) serves to relieve a party from a final judgment or order on one of several specified grounds. The rule provides in pertinent part:

Delo as Superintendent and thus has been substituted as the named respondent. For purposes of simplicity, the Court will refer to the respondent as "the State."

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

What constitutes a reasonable time for filing a motion under Rule 60(b) depends on the particular facts of each case. Harris v. Union Electric Co., 846 F.2d 482 (8th Cir. 1988). In Harris, the court of appeals found that the district court did not abuse its discretion in entertaining a Rule 60(b) (5)-(6) motion made after exhaustion of the appeals process and almost twenty-three months after judgment was entered. Id. In this case, Petitioner's motion was filed on February 8, 1996,

less than four months after the remand order and nine months after this Court's original judgment and order. The appellate process has been suspended with the remand. Under the circumstances of this case, which include an order for remand from the court of appeals, evidentiary hearing and additional briefing, the motion was made within a reasonable time.

Rule 60(b)(6), the provision upon which petitioner relies, affords relief in "exceptional circumstances" where the moving party cannot seek redress "through the usual channels". United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986). The district court has wide discretion in deciding whether or not to grant a motion under Fed.R.Civ.P. 60(b), therefore requiring clear abuse of discretion for reversal. Atkinson v. Prudential Property Company, Inc., 43 F.3d 367, 371 (8th Cir. 1994); Tungseth v. Mutual of Omaha Insurance Co., 43 F.3d 406, 409 (8th Cir. 1994). The rule is fully applicable to habeas corpus actions under 28 U.S.C. § 2254. Browder v. Department of Corrections, 434 U.S. 257 (1978).

The Court reads these standards for relief from judgment to require consideration of how justice can best be served. The Court has weighed a variety of factors, including the value of finality, the probability that an error affected the outcome of the earlier order, the probability that a revised order could better settle the matter, and the costs to the parties. See Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985). Considering the remand and the fact that this Court had not ruled on all the claims in the petition for writ of habeas corpus, finality has not been compromised. No additional cost to the parties is involved. Petitioner does not attempt to use the motion

as a device merely to avoid the consequences of an adverse judgment or in the absence of an appeal. He prevailed on one claim and seeks to voluntarily dismiss with prejudice the only other claim addressed by this Court in the May 16, 1995 Order.

Further, the State's argument that the motion is the equivalent of a successive habeas petition is untenable in this case. No additional claim has been presented. The parties had not submitted briefs and the Court of Appeals had not reviewed the Order of May 16, 1995 before the State moved for remand. See Murray v. Delo, 34 F.3d 1367, 1374 (8th Cir. 1994). The authority cited by the State, Guinan v. Delo, 5 F.3d 313 (8th Cir. 1993), Bolder v. Armontrout, 983 F.2d 98 (8th Cir. 1992) and Blair v. Armontrout, 976 F.2d 1130 (8th Cir. 1993), is neither dispositive nor relevant here. Those cases all involved habeas corpus litigants whose petitions had been fully reviewed and denied on appeal before new additional claims were raised in this Court. This is a first habeas corpus petition to which the doctrine of abuse of the writ does not apply. Lonchar v. Thomas, No. 95-5015 (U.S. Apr. 1, 1996).

In the interest of judicial economy, Petitioner's motion to dismiss certain claims with prejudice will be granted. There must be a clear understanding, however, that those claims are forever barred. McCleskey v. Zant, 499 U.S. 467 (1991). The Court intends to decide all remaining claims in the Amended Petition in a single revised order. One of the claims this Court had not resolved in the Order of May 16, 1995 is Petitioner's assertion that his guilty plea was not knowing, intelligent and voluntary. This involves questions of fact and law substantially related to the claim regarding the waiver of counsel which was

decided in the previous order. Clarity and judicial economy would dictate that these issues be addressed together in a single order. The testimony presented at the evidentiary hearing after remand has been helpful in that regard. It is certain that an appeal will follow this Court's decision, regardless of the outcome. Appellate review of two separate judgments and a claim that has since been dismissed would be an exercise in futility and confusion. The wiser course of action would be to set aside the previous judgment and order.[2] Accordingly, it is hereby

ORDERED that Petitioner's Motion to Set Aside Order (doc. #81) dated May 16, 1995 is granted. The Judgment dated May 18, 1995 is therefore vacated. It is further

ORDERED that Petitioner's Revised Motion to Dismiss Certain Claims in the Amended Petition (doc. #89) is granted.

(signature)

SCOTT O. WRIGHT
Senior United States Judge

April 23, 1996

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[2] It is not necessary to determine whether the Order of May 16, 1995, which did not dispose of all claims, and the Judgment entered May 18, 1995, constituted a final appealable judgment. Rule 60(b) by its terms operates to set aside final judgments or orders.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2724WMKC

Heath Allen Wilkins,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Western District of
	*	Missouri
Paul Delo,	*	
	*	
Appellant.	*	

JUDGMENT

The appellant's motion to remand is granted. This appeal is remanded to the district court for resolution of all matters contained in the first amended petition for writ of habeas corpus.

Mandate to issue forthwith.

October 3, 1995

Order Entered at the Direction of the Court:

(signature - Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0861-CV-W-5
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

ORDER

Before the Court are respondent's motions to alter or amend judgment and to stay order and judgment. Respondent moves the Court to alter or amend this Court's May 16, 1995 Order conditionally granting petitioner relief and to stay enforcement of the May 16, 1995 Order pending resolution of respondent's motion to alter or amend judgment.

Respondent's motion to alter or amend judgment will be denied. Respondent's motion to stay order and judgment is therefore moot and will be denied as such.

Accordingly, it is hereby

ORDERED that respondent's motion to alter or amend judgment (document 47) is denied. It is further

ORDERED that respondent's motion to stay order and judgment (document 48) is denied.

(signature)

SCOTT O. WRIGHT
Senior United States District Judge

June 16th, 1995

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0861-CV-W-5
	)	
PAUL K. DELO,	)	
	)	
Respondent.	)	

ORDER

Before the Court is Heath A. Wilkins' First Amended Petition for Writ of Habeas Corpus, the State's[1] response, petitioner's traverse, and supplemental briefs on the issue of petitioner's competency. For the reasons set forth below, Mr. Wilkins' petition will be granted.

I. Background

Petitioner pled guilty to first degree murder and was sentenced to death in the Circuit Court of Clay County, Missouri. The Supreme Court of Missouri affirmed on direct review. The Supreme Court of the United States granted certiorari on a limited issue and affirmed. Petitioner's state post-conviction motion was

[1] The named respondent in this action is Paul Delo, the Superintendent of the Potosi Correctional Center. For purposes of simplicity, the Court will refer to the respondent as "the State."

denied by the sentencing court, the Supreme Court of Missouri affirmed the denial, and the Supreme Court of the United States denied petitioner's writ of certiorari. Petitioner then filed the habeas corpus action currently before the Court.

In July of 1985, petitioner and three companions, Patrick Stevens, Ray Thompson and Marjorie Filipiak, devised a plan to rob Linda's Liquors, a small convenience store in Avondale, Missouri. Pursuant to the plan, on July 27, 1985, petitioner and Stevens entered the store and ordered a sandwich from the store clerk, Nancy Allen. Stevens then seized Allen and petitioner stabbed her repeatedly, inflicting fatal wounds. Petitioner and Stevens gathered cash and merchandise and left the store. The two later joined Thompson and Filipiak to split up the money. On August 10, 1985, petitioner, Stevens, Thompson and Filipiak were arrested for the murder of Nancy Allen.

On August 15, 1985, petitioner, then 16 years old, was certified by the juvenile court to stand trial as an adult. On October 17, 1985, petitioner appeared with appointed counsel, Fred Duchardt, for arraignment in the Circuit Court of Clay County, Missouri before the Honorable Glennon E. McFarland. (Cir. Ct. Tr. at 3).[2] Petitioner was charged with murder in the first degree, unlawful use of a weapon, and armed criminal action. (Cir. Ct. Tr. at 4-5). Petitioner, through counsel, entered a dual plea of not guilty by reason of mental disease or defect excluding responsibility and not guilty. (Cir. Ct.

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[2] The Court will refer to the transcript of the arraignment, competency hearing, pleas of guilty and sentencing before Judge McFarland as the "Circuit Court Transcript," or "Cir. Ct. Tr."

Tr. at 4). Mr. Duchardt informed the court that he questioned whether petitioner was competent to proceed and moved for a mental examination of petitioner. (Cir. Ct. Tr. at 4). The court granted the motion and ordered petitioner to be examined at a state hospital. (Cir. Ct. Tr. at 5).

On November 27, 1985, Dr. Steven Mandracchia, a clinical psychologist for the State Department of Mental Health, performed the mental examination. (Cir. Ct. Tr. at 9). On December 23, 1985, Mr. Duchardt requested and obtained leave of court for an additional mental examination. (Cir. Ct. Tr. at 5-6). The additional examination was performed in March of 1986 by Dr. William Logan, a forensic psychiatrist with the Menniger Clinic. (Cir. Ct. Tr. at 17-18). Sometime between these two examinations, petitioner informed his counsel that he wanted to enter a guilty plea and receive a death sentence.

On April 16, 1986, the court held a hearing on petitioner's competency to stand trial. On direct examination by Mr. Duchardt, Dr. Mandracchia testified that his evaluation of petitioner consisted of interviewing petitioner for approximately ninety-five minutes, reviewing information on petitioner's background and administering the Minnesota Multiphasic Personality Inventory ("M.M.P.I."). (Cir. Ct. Tr. at 9-11). Dr. Mandracchia testified that, based on his evaluation, he did not believe petitioner suffered from a mental disease or defect as defined by Chapter 552 of the Missouri Revised Statutes.[3] (Cir. Ct. Tr. at 11). Dr. Mandracchia

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[3] In 1985, Section 552.020.1 of the Missouri Revised Statutes provided that "[n]o person who as a result of mental disease or defect lacks capacity to

also stated his belief that petitioner was competent to proceed to trial. (Cir. Ct. Tr. at 12).

Mr. Duchardt noted that Mr. Mandracchia had only recently been informed of petitioner's desire to plead guilty and receive the death penalty and asked Dr. Mandracchia if this information changed his opinion as to petitioner's competency. (Cir. Ct. Tr. at 12-13). Dr. Mandracchia stated that it did not. (Cir. Ct. Tr. at 13).

Dr. Logan also testified at the competency hearing. He stated that his evaluation of petitioner consisted of a five-hour psychiatric interview, six hours of psychological testing, and a review of petitioner's extensive psychiatric records. (Cir. Ct. Tr. at 17-18). Dr. Logan stated that he did not reach a definite conclusion as to whether petitioner was competent to proceed. (Cir. Ct. Tr. at 18). Dr. Logan testified that petitioner had a fairly good cognitive understanding of the court proceedings, but that he suffered from an emotional impairment that could interfere with his decision-making process and his ability to act in his own

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understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Mo. Rev. Stat. § 552.020.1 (1985). Section 552.030.1 provided that "[a] person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect he did not know or appreciate the nature, quality, or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of the law." Mo. Rev. Stat. § 552.030.1 (1985).

best interests. (Cir. Ct. Tr. at 22). Given these factors, Dr. Logan believed it was appropriate to describe his opinion and allow the court to determine whether petitioner was competent to proceed. (Cir. Ct. Tr. at 22-23).

After Dr. Logan's testimony, the court found that petitioner was competent to proceed. (Cir. Ct. Tr. at 42). Petitioner then informed the court that he wished to proceed pro se. (Cir. Ct. Tr. at 42). In response to the court's questions, Mr. Duchardt and petitioner explained that petitioner wanted to proceed pro se because he wanted to plead guilty and seek the death penalty. (Cir. Ct. Tr. at 42-45).

The court advised petitioner of his right to an attorney and his right to proceed without counsel. (Cir. Ct. Tr. at 49-51). Petitioner stated that he did not want an attorney if the attorney could not assist him in seeking the death penalty. (Cir. Ct. Tr. at 52). The court warned petitioner of the problems he could encounter without counsel, but petitioner was unwavering in his desire to proceed without counsel and seek the death penalty. (Cir. Ct. Tr. at 52-59). The court instructed petitioner to think about his decision for a few days and ordered Mr. Duchardt to remain available to answer any questions petitioner might have. (Cir. Ct. Tr. at 59, 67).

The next hearing on petitioner's motion to proceed pro se was held April 23, 1986. The court again cautioned petitioner about the dangers of proceeding pro se and informed petitioner of the advantages of having counsel at the various stages of the proceedings. (Cir. Ct. Tr. at 70-79). Petitioner continued to assert that he wanted to proceed pro se.

(Cir. Ct. Tr. at 70-79). The court provided petitioner with waiver of counsel forms, which petitioner signed and filed with the court. (Cir. Ct. Tr. at 83-87). The court accepted the waivers and granted Mr. Duchardt leave to withdraw, provided he remain available to petitioner for consultation. (Cir. Ct. Tr. at 87-88). At the close of the hearing, the court again advised petitioner to reconsider his course of action. (Cir. Ct. Tr. at 94-95).

On April 29, 1986, the court provided petitioner with petitions to enter pleas of guilty. (Cir. Ct. Tr. at 97-98). The court again advised petitioner of the rights he would waive by entering the pleas and assured petitioner that he could change his mind at any time until the court accepted the guilty pleas. (Cir. Ct. Tr. at 98-102).

On May 9, 1986, the court held the change of plea hearing. The court fully informed petitioner of the various rights he was waiving by entering guilty pleas. (Cir. Ct. Tr. at 110-22). The court asked petitioner if he was entering the pleas voluntarily and explained this meant that the decision to plead guilty was his decision. (Cir. Ct. Tr. at 122-23, 148, 156). Petitioner answered affirmatively. (Cir. Ct. Tr. at 123, 148, 156). The court asked petitioner if he had received any threats, promises or other inducements to persuade him to enter the pleas and petitioner stated he had not. (Cir. Ct. Tr. at 123, 148-49, 156). The court asked petitioner to state the facts relating the crime, which he did. (Cir. Ct. Tr. at 124-28).

The court found that petitioner's pleas were made voluntarily, intelligently and with a full understanding of the charges and consequences of the

pleas. (Cir. Ct. Tr. at 144, 153, 163). The court then accepted each guilty plea and ordered presentence investigation reports. (Cir. Ct. Tr. at 144, 153-54, 163-64).

The sentencing hearing was held on June 27, 1986. Petitioner again appeared pro se, with Mr. Duchardt available for consultation. (Cir. Ct. Tr. at 167-68). Petitioner signed "Waiver of Trial by Jury" and "Waiver of Counsel" forms and stated that he understood their contents. (Cir. Ct. Tr. at 179-83). The court gave petitioner one last opportunity to withdraw his pleas of guilty, but petitioner stated he wanted to continue with the sentencing. (Cir. Ct. Tr. at 184-88).

The State presented evidence of the crime through the police officer called to the scene, the coroner who performed the autopsy of Nancy Allen, an investigating police officer, and Nancy Allen's husband. (Cir. Ct. Tr. at 194-233). The State called Dr. Mandracchia, who testified that petitioner did not suffer from a mental disease or defect, as defined by Missouri law, at the time the crime was committed. (Cir. Ct. Tr. at 246). Dr. Logan testified that petitioner could have had a mental disease or defect at the time the crime was committed, but that the defect was not such that petitioner could not appreciate the nature, quality or wrongfulness of his conduct or conform his conduct to the requirements of the law.[4] (Cir. Ct. Tr. at 270).

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[4] The State also called witnesses to testify about petitioner's juvenile history, however, these witnesses were cut short when the court sustained petitioner's relevancy objections. (Cir. Ct. Tr. at 233-45).

Petitioner's only witness was Patrick Stevens, who asserted his Fifth Amendment right against self-incrimination and refused to answer petitioner's questions. (Cir. Ct. Tr. at 278-29, 287-89). During closing arguments, both the State and petitioner asked the court to impose the death penalty. (Cir. Ct. Tr. at 289-98). After finding that aggravating circumstances existed, the court sentenced petitioner to death. (Cir. Ct. Tr. at 300-02).

Consistent with his announced desire to be put to death, petitioner did not appeal the trial court's judgment and sentence. The Supreme Court of Missouri, however, requested the State Public Defender to enter the case as amicus curiae and brief and argue "any issue subject to review." State v. Wilkins, 736 S.W.2d 409, 411 (Mo. banc 1987).[5] Before the case was argued in the Supreme Court of Missouri, petitioner appeared in person and informed the court that he did not want the assistance of counsel in proceedings before the court. Id. Counsel then argued the case, after which the court allowed petitioner to address the court. Id. Petitioner used the opportunity to contest statements made by the public defender concerning his competency. Id.

The court then stayed the proceedings to determine if petitioner was competent to waive his right to counsel on appeal. Id. The court ordered the State Department of Mental Health to determine petitioner's competence to waive his right to counsel. Id. Dr. S.D.

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[5] Section 565.035.1 of the Missouri Revised Statutes requires the Supreme Court of Missouri to review all sentences of death. Mo. Rev. Stat. § 565.035.1 (1983).

Parwatikar performed the evaluation on behalf of the Department of Mental Health and concluded that petitioner was not competent to waive his right to counsel. (Rule 24.035 Transcript at 848-49). After Dr. Parwatikar filed his report and evaluation, the Supreme Court of Missouri appointed counsel for petitioner, ordered new briefs, and heard argument in the case again. Wilkins, 736 S.W.2d at 411. On September 15, 1987, the Supreme Court of Missouri affirmed the trial court's judgment and sentence. Id. at 417.

The Supreme Court of the United States granted certiorari in Wilkins and a companion case, Stanford v. Kentucky, to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age. Wilkins v. Missouri, 487 U.S. 1233 (1988); Stanford v. Kentucky, 488 U.S. 887 (1988). The Court found that it did not and, on June 16, 1989, affirmed the judgment of the Supreme Court of Missouri. Stanford v. Kentucky, 492 U.S. 361 (1989).

On June 30, 1988, petitioner moved pursuant to Rule 24.035 of the Supreme Court Rules to set aside his conviction and sentence (Legal File at 1). The sentencing court appointed counsel for petitioner and held a hearing on the motion from May 22-26, and June 5, 1989. The testimony relevant to the issues addressed by this Court is described below.

Petitioner first called Dr. Dorothy Lewis, a psychiatrist, to testify. (R. 24 Tr. at 5-6).[6] Dr. Lewis

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[6] The Court will refer to the transcript of the Rule 24.035 hearing as "R.24 Tr." The transcript itself is titled "Transcript of Rule 29.15 Hearing."

testified that, at the request of the public defender's office, she performed a psychiatric evaluation of petitioner. (R. 24 Tr. at 14-15). The evaluation consisted of a five-hour psychiatric interview of petitioner on August 25, 1988 and a review of petitioner's psychiatric records, juvenile history, and transcripts of the case. (R.24 Tr. at 15-21). Dr. Lewis testified that, in her opinion, petitioner was not competent to stand trial and was not competent to proceed without the assistance of counsel at the time he entered his guilty plea and waived his right to counsel. (R.24 Tr. at 22-23, 47-48, 74-75).

Dr. Lewis stated that, based on petitioner's auditory hallucinations, as documented in his psychiatric records, his illogical thought processes and his paranoid ideation, she believed petitioner was psychotic. (R.24 Tr. at 23-27). She testified that petitioner was able to appear quite rational initially, but after approximately an hour of contact with petitioner, his psychotic condition began to evidence itself. (R.24 Tr. at 24).

Dr. William O'Connor, a clinical psychologist, next testified on behalf of petitioner. (R.24 Tr. at 139). Dr. O'Connor stated that he administered numerous standardized tests to petitioner on January 7, 25, and 31, 1985. (R.24 Tr. at 143). The tests included the Halstead-Reitan neuropsychological battery of tests, a psychological battery[7] and the Luria-Nebraska

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however, Rule 24.035 of the Supreme Court Rules provides for postconviction relief after a plea of guilty, whereas Rule 29.15 provides for relief after a trial.

[7] The psychological battery of tests included a M.M.P.I. (R. 29 Tr. at 147).

neuropsychological battery. (R.24 Tr. at 144). Based on the test results, Dr. O'Connor concluded that petitioner suffered from a schizoaffective disorder. (R.24 Tr. at 154-56). Dr. O'Connor testified that, at the time petitioner entered his plea of guilty, he was not competent to stand trial or proceed without counsel. (R.24 Tr. at 167). Dr. O'Connor stated that, in his opinion, petitioner suffered from a mental illness which severely impaired his ability to anticipate consequences and use judgment. (R.24 Tr. at 174).

Dr. Jonathan Pincus, a professor of neurology and chairman of the Department of Neurology at Georgetown University School of Medicine, also testified on behalf of petitioner. (R.24 Tr. at 309). Dr. Pincus testified that he performed a neurological history examination of petitioner on August 25, 1988 and reviewed petitioner's juvenile records. (R.24 Tr. at 319-20, 323). An E.E.G., M.R.I. scan and SPECT scan were also performed. (R.24 Tr. at 324). Dr. Pincus stated that, in his opinion, petitioner was not competent to proceed or to waive his right to counsel at the time of guilty plea. (R.24 Tr. at 359-61).

Petitioner next called Dr. Logan to testify at the hearing. (R.24 Tr. at 45). Dr. Logan stated that he had not been asked during the initial proceedings to render an opinion concerning petitioner's competency to waive his right to counsel. (R.24 Tr. at 469-70). Dr. Logan believed petitioner suffered form psychiatric difficulties which significantly impacted his ability to make decisions in the case (R.24 Tr. at 471). Dr. Logan testified that petitioner possessed cognitive ability, but that he did not use his ability when making decisions. (R.24 Tr. at 472). Dr. Logan believed petitioner made decisions without actually considering the

consequences of the decisions. (R.24 Tr. at 472). Therefore, Dr. Logan believed, petitioner was not competent to proceed without the assistance of counsel. (R.24 Tr. at 471-72).

Petitioner then recalled Dr. O'Connor. (R.24 Tr. at 666). Dr. O'Connor explained that, at petitioner's counsel's request, he had obtained and reviewed petitioner's results form the M.M.P.I. administered by Dr. Mandracchia in December of 1985. (R.24 Tr. at 666-67). Dr. O'Connor stated that he had rescored the tests results, which provided him with a psychological profile of petitioner at the time the test was administered. (R.24 Tr. at 668).

Dr. O'Connor testified that Dr. Mandracchia's interpretation of the test was not consistent with the standard texts on M.M.P.I. interpretation. (R.24 Tr. at 668). Dr. O'Connor believed the M.M.P.I. results demonstrated that petitioner was not competent to make a knowing, intelligent, voluntary and rational choice between the alternatives available to him at the time he pled guilty. (R.24 Tr. at 688). Petitioner rested after Dr. O'Connor's testimony. (R.24 Tr. at 735).

The State first called Fred Duchardt, petitioner's appointed counsel during the certification hearing in juvenile court and the initial competency hearings. (R.24 Tr. at 611-12). After Mr. Duchardt's memory was refreshed with the juvenile court record, he testified that he requested a mental evaluation of petitioner and that the juvenile court denied the request.[8] (R.24 Tr. at 626-

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[8] On direct examination, Mr. Duchardt had testified that he did not request a psychiatric evaluation of petitioner in the juvenile court. (R.29 Tr.

28). Mr. Duchardt stated that he has always believed that petitioner was not competent to proceed, to waive his right to counsel, or to plead guilty. (R.24 Tr. at 637, 655). Mr. Duchardt testified that, in his opinion, petitioner's decisions to waive his right to counsel, plead guilty and seek the death penalty were not rational, voluntary, intelligent decisions made after an intelligent weighing of the alternatives. (R.24 Tr. at 642).

The State next called Dr. Mandracchia, who examined petitioner in November 1985 to determine petitioner's competency to stand trial. (R.24 Tr. at 736). Dr. Mandracchia was again asked if he believed petitioner was competent to proceed. (R.24 Tr. at 741). Mr. Mandracchia responded that his examination had revealed no evidence of a mental disease or defect that excluded petitioner from proceeding. (R.24 Tr. at 741).

Dr. Mandracchia was also asked, for the first time, if he could render an opinion as to whether petitioner was competent to waive his right to counsel. (R.24 Tr. at 812). Dr. Mandracchia responded that he did not assess petitioner's ability to waive counsel and could not render an opinion on the subject. (R.24 Tr. at 812-13). The State rested after Dr. Mandracchia's testimony. (R.24 Tr. at 817).

The court convened to hear argument in the case the following morning. (R.24 Tr. at 818). The State, however, moved to continue the case for one week. (R.24 Tr. at 818-19). The State informed the court that it was surprised by Dr. Mandracchia's response concerning petitioner's competency to waive his right to counsel. (R.24 Tr. at 819). The State requested that

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at 618).

Dr. Mandracchia be permitted to re-examine petitioner and moved to reopen its case to hear Dr. Mandracchia's testimony on the issue. (R.24 Tr. at 819).

Petitioner's counsel strenuously objected to the State's requests on several grounds. (R.24 Tr. at 820-23, 828-31, 832-34, 835-38, 839-40). The court granted the State's motions and ordered Dr. Mandracchia to conduct a psychological evaluation of petitioner. (R.24 Tr. at 839).

The court reconvened the hearing on June 5, 1989. Dr. Mandracchia had not yet arrived to testify, so petitioner called Dr. Parwatikar, his rebuttal witness, first. (R.24 Tr. at 843-44). Dr. Parwatikar had performed the evaluation of petitioner ordered by the Supreme Court of Missouri in October of 1986 to determine if petitioner was competent to waive his right to counsel on appeal. (R.24 Tr. at 846-48). Dr. Parwatikar testified that his evaluation of petitioner consisted of a two and one-half hour interview and a review of the case transcripts, psychiatric reports and petitioner's records. (R.24 Tr. at 847-48). Dr. Parwatikar stated that he concluded, and informed the Supreme Court of Missouri, that petitioner was not competent to waive his right to counsel. (R.24 Tr. at 848-49).

Dr. Parwatikar believed petitioner had the cognitive ability to understand the proceedings against him, but that he suffered from a mental disorder which rendered him incapable of deciding to waive his right to counsel through appropriate reasoning. (R.24 Tr. at 850-52). Dr. Parwatikar also testified that petitioner was not competent to waive his right to counsel in early

1986, when he was initially allowed to waive counsel and plead guilty. (R.24 Tr. at 857).

The State then recalled Dr. Mandracchia. (R.24 Tr. at 890). Dr. Mandracchia testified that, pursuant to the court's order, he performed another psychological evaluation of petitioner. (R.24 Tr. at 891-92). Dr. Mandracchia testified he had interviewed petitioner for seven to eight hours over a two-day period and reviewed the psychiatric reports and petitioner's records. (R.24 Tr. at 891-92). Dr. Mandracchia stated that, in his opinion, petitioner waived his right to counsel knowingly, but not intelligently or voluntarily. (R.24 Tr. at 893).

Dr. Mandracchia believed petitioner was able to waive his right to counsel knowingly because he understood who his counsel was and that the waiver meant he chose not to have counsel assist him. (R.24 Tr. at 893-94). Dr. Mandracchia believed petitioner was not able to waive his right to counsel voluntarily because he was coerced, in an interpsychic or intrapersonal sense, by an irrational, overriding fear of long-term incarceration. (R.24 Tr. at 894-96, 903). Dr. Mandracchia believed petitioner was not able to waive his right to counsel intelligently because petitioner simply did not consider any option other than death. (R.24 Tr. at 897). Dr. Mandracchia stated that petitioner did not engage in a true decision-making process, but that he made the decision with the perspective that there were no alternatives. (R.24 Tr. at 900). Dr. Mandracchia believed that once petitioner began to seek the death penalty, all other decisions, including the decision to waive his right to counsel, were simply methods to achieve his goal of being sentenced to death. (R.24 Tr. at 898-99).

Dr. Mandracchia provided the court with a written report of his findings. (R.24 Tr. at 901). In addition to his findings concerning petitioner's waiver of his right to counsel, the report stated that petitioner's decisions to plead guilty and to waive the right to offer evidence in mitigation of sentence were made knowingly, but not voluntarily or intelligently. (State's Ex. 33). Therefore, the report stated, petitioner was not competent to make these decisions. (State's Ex. 33).

The State rested after Dr. Mandracchia's testimony. (R.24 Tr. at 901). The court then heard argument from counsel and ordered the parties to submit proposed findings of fact and conclusions of law. (R.24 Tr. at 907-84). On July 26, 1989, the court denied petitioner's motion. (Legal File at 113). The court found the psychiatrists' and psychologists' testimony "unpersuasive" and found that petitioner "knowingly, voluntarily, intelligently, and competently waived his right to counsel." (Legal File at 92-93).

Petitioner filed an appeal in the Missouri Court of Apeals, Western District. (Legal File at 115). After the appeal was transferred to the Supreme Court of Missouri, the court affirmed the denial. Wilkins v. State, 802 S.W.2d 491 (Mo. banc 1991). On the issue of the sentencing court's finding that petitioner was competent to waive his right to counsel, the court held that the sentencing "court may reject any witnesses' testimony though no contrary evidence is offered." Id. at 501. Petitioner's writ of certiorari was denied by the Supreme Court of the United States. Wilkins v. Missouri, 502 U.S. 841 (1991).

II. Analysis

Petitioner contends he was denied his right to counsel under the Sixth and Fourteenth Amendments because he was not competent to waive the right and because the waiver was not knowingly, voluntarily or intelligently made.[9] The State argues that the sentencing court's finding that petitioner's waiver of his right to counsel was made competently, intelligently, knowingly and voluntarily is well-supported and should not be disturbed by this Court.

On habeas review of a state conviction, this Court accords a presumption of correctness to state court findings of fact. 28 U.S.C. §2254(d). Section 2254(d) provides eight exceptions to this presumption. One of the exceptions exists if this Court concludes that a factual determination is not "fairly supported by the record." 28 U.S.C. §2254(d)(8).

Whether a defendant has voluntarily waived rights guaranteed by the Federal Constitution is a question of federal law, and not a question of fact subject to the requirements of Section 2254(d). Marshall v. Loneberger, 459 U.S. 422, 432 (1983). However, underlying questions of fact relating to the legal issue are questions of fact for purposes of Section 2254(d). Id. at 431-32; see also Demosthenes v. Baal, 495 U.S. 731, 7335 (1990) (state court's finding regarding a defendant's competency is entitled to Section 2254(d) presumption). Accordingly, the issue before this Court is whether the state court's findings

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[9] Petitioner raises numerous other claims, however, because the Court holds that petitioner's right to counsel was violated, the other claims will not be addressed.

with regard to petitioner's waiver of his right to counsel are fairly supported by the record.

The Sixth and Fourteenth Amendments guarantee a criminal defendant in a state proceeding the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963). In determining whether there has been a valid waiver of right to counsel, courts must "indulge every reasonable presumption against waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)). "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson, 304 U.S. at 465. "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948). "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson, 304 U.S. at 464.

In Godinez v. Moran, 113 S. Ct. 2680 (1993), the Supreme Court of the United States announced the competency standard for waiving the right to counsel and pleading guilty. The Court granted certiorari on the issue of whether the competency standard for waiving these rights was higher than the competency standard

for standing trial. Id. at 2684-85. The Court stated that the standard for competence to stand trial is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. at 2685 (quoting Dusky v. United States, 362 U.S. 402 (1960 (per curiam)). The Court held that the standard for competence to waive the right to counsel or plead guilty is not higher. Godinez, 113 S. Ct. at 2686. Thus, a defendant who is competent to stand trial is competent to waive the right to counsel and plead guilty.

"A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Godinez, 113 S. Ct. at 2687 (citing Parke v. Raley, 113 S. Ct. 517, 523 (1992) (The standard is whether the waiver represents a voluntary and intelligent choice among the alternative courses of action open to the defendant), and Faretta v. California, 422 U.S. 806, 835 (1975) (accused must "knowingly and intelligently" forego benefits of right to counsel)).

The Godinez Court held that, "[i]n this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence." Godinez, 113 S.Ct. at 2687 (emphasis in original). The Court explained that the "focus of a competency inquiry is the defendant's mental capacity; the question is whether he

has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id. at 2687 n.12 (emphasis in original) (citations omitted).

Petitioner first argues that he was not competent to waive his right to counsel. The State contends that the record supports the sentencing court's determination that petitioner was competent to stand trial. Thus, the State argues, under Godinez, petitioner was competent to waive his right to counsel. This Court agrees. Dr. Mandracchia's testimony on the issue of competency to stand trial appears to constitute "fair support" for the court's finding that petitioner was competent to stand trial. Accordingly, the record fairly supports the sentencing court's finding that petitioner was competent to waive his right to counsel as well.

Petitioner next argues that the sentencing court's finding that he knowingly, intelligently and voluntarily waived his right to counsel is erroneous. The State contends the record supports the court's findings on this issue.

After an exhaustive review of the more than fifteen hundred pages of transcript of the state court proceedings, this Court has reached the inescapable conclusion that the sentencing court's finding that petitioner intelligently and voluntarily waived his right to counsel is not fairly supported by the record. Rather, all the evidence on the record contradicts the finding.

The Court first considers the conclusions of Dr. Mandracchia, the State's primary witness and the only psychiatrist or psychologist to examine petitioner prior to and after the relevant period of time. After his extensive re-evaluation of petitioner, Dr. Mandracchia concluded that petitioner could not intelligently or voluntarily waive his right to counsel.[10] Dr. Mandracchia believed petitioner was not able to waive the right voluntarily because he was coerced, in an interpsychic or intrapersonal sense, by an irrational, overriding fear of long-term incarceration. Dr. Mandracchia believed petitioner was unable to waive his right to counsel intelligently because petitioner simply did not consider any option other than death. Dr. Mandracchia stated that petitioner did not engage in a true decision-making process, but that he made the decision with the perspective that there were no alternatives.

Dr. Logan's conclusions were very similar to Dr. Mandracchia's. Dr. Logan testified that petitioner possessed cognitive ability, but, due to his psychiatric condition, he made decisions without truly considering the consequences. Dr. Parwatikar also believed petitioner possessed the cognitive ability to understand

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[10] Dr. Mandracchia also stated petitioner knowingly waived his right to counsel, but he based this opinion on the fact that petitioner knew who his counsel was and that the waiver meant he chose not to have counsel assist him. This level of awareness obviously does not satisfy the "knowingly" standard described by the Godinez Court as requiring that the defendant actually understands the significance and consequences of his decisions. Dr. Mandracchia's use of "intelligently" does appear to be consistent with the constitutional standard.

the proceedings, but concluded that petitioner's mental disorder rendered him incapable of making the decision to waive his right to counsel through appropriate reasoning.

Dr. O'Connor testified that petitioner suffered from a mental illness which severely impaired his ability to anticipate consequences and use judgment. After reviewing the results of the M.M.P.I. originally administered to petitioner by Dr. Mandracchia, Dr. O'Connor offered a more specific opinion. Dr. O'Connor testified that petitioner was not able to make a knowing, intelligent, voluntary and rational choice between the alternatives available to him at the time he pled guilty.[11]

Thus, every single psychiatrist and psychologist answering the question, including the two state doctors examining petitioner pursuant to orders from state courts, concluded that petitioner could not intelligently or voluntarily waive his right to counsel. The State offered absolutely no evidence that petitioner was capable of intelligently and voluntarily waiving his right to counsel. The State's only evidence in the Rule 24.035 hearing consisted of two witnesses who, on this

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[11] Dr. Lewis and Dr. Pincus both testified that petitioner suffered from a mental disorder rendering him incompetent to stand trial or waive his right to counsel, but were not specifically asked about petitioner's ability to knowingly, intelligently or voluntarily make the decision to waive his rights.

issue, testified to the exact opposite of that expected by the State.[12]

The State contends that the record supports the sentencing court's finding because the sentencing court thoroughly advised petitioner of his constitutional rights and the dangers of waiving them. The trial court did fully inform petitioner of the various rights he was waiving and disadvantages of waiving those rights. However, the knowingly and voluntarily prong of the Godinez standard clearly requires more than merely exposing a defendant to information--it requires that "the defendant actually does understand the significance and consequences of a particular decision." Godinez, 113 S. Ct. at 2687 n.12. Every psychiatrist and psychologist that offered testimony on the issue concluded that petitioner suffered from a mental disorder that prevented him from possessing such an understanding. In light of the undisputed psychiatric opinion, the fact that the sentencing court informed petitioner of his rights is of little consequence.

The State argues that the sentencing court's otherwise sufficient colloquy with petitioner concerning his rights cannot be rendered deficient simply because

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[12] The State apparently expected Fred Duchardt to testify that he did not ask the juvenile court for a psychiatric evaluation to determine competency because he did not feel such an evaluation was necessary. (R.24 Tr. at 618). The State also expected Dr. Mandracchia to testify that petitioner could intelligently and voluntarily waive his right to counsel. (R.24 Tr. at 819).

petitioner suffered from a mental disorder.[13] In essence, the State contends that the petitioner's mental disorder is not relevant to whether he knowingly and voluntarily waived his rights as long as the court fully informed petitioner. This Court disagrees. Clearly, a defendant's mental condition is relevant to his ability to truly knowingly and voluntarily waive his constitutional rights. This proposition is supported by common sense as well as the extensive psychiatric testimony in this case.

Two Circuit Court of Appeals' cases decided since Godinez recognize that a mental condition is relevant to whether the defendant knowingly and voluntarily waives constitutional rights. In United States v. Cash, 47 F.3d 1083 (11th Cir. 1995), the issue before the Eleventh Circuit was whether the defendant's waiver of his right to counsel had been knowing, voluntary and intelligent. Id. at 1088. The trial court had found the defendant competent to stand trial and allowed him to waive his right to counsel. Id. at 1086-87. On appeal of his conviction, the defendant did not argue that he was not competent to waive his right to counsel, but argued that the waiver of the right was not knowing, voluntary and intelligent. Id. at 1089 n.3. The Eleventh Circuit concluded that, in light of the defendant's mental disorder, it was questionable whether the defendant actually possessed the information necessary to make

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[13] The State also argues that, if a mental disorder is relevant to the issue, this is a new rule under Teague v. Lane, 489 U.S. 288 (1989). The Court disagrees. The Godinez decision did not impose or alter the requirement that a defendant must knowingly and voluntarily waive constitutional rights.

a knowing, voluntary and intelligent waiver.[14] Id. at 1090. See also Weisberg v. State of Minnesota, 29 F.2d 1271, 1278 (8th Cir. 1994) (letter from psychologist, while found to be ambivalent and thus unpersuasive, was relevant to whether defendant knowingly and voluntarily entered guilty plea). The State's assertion that petitioner's mental impairment is not relevant to whether he knowingly, intelligently and voluntarily waived his right to counsel is without merit.

III. Conclusion

This Court holds that the state court's finding that petitioner intelligently and voluntarily waived his right to counsel is not fairly supported by the record. Accordingly, the finding is not entitled to the presumption of correctness under Section 2254(d).

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[14] The court noted that, had the trial court engaged the defendant in a more searching colloquy, the government might have met its burden of showing that the defendant knowingly, voluntarily and intelligently waived his right to counsel. Cash, 47 F.3d at 1090. A more searching discussion could remedy the error in Cash because the defendant's mental disorder was such that it caused him to overestimate and overstate his abilities. Id. In the case at bar, petitioner's mental disorder apparently prevents him from understanding the significance and consequences of his decisions. Thus, an extensive discussion with petitioner could not satisfy the requirement. This Court cites Cash only for the proposition that a defendant's mental disorder is relevant in determining whether he is able to knowingly, intelligently and voluntarily waive his right to counsel.

The Court holds that petitioner was denied his right to counsel guaranteed by the Sixth and Fourteenth Amendments. Petitioner is therefore in custody in violation of the Constitution of the United States. Petitioner's petition for writ of habeas corpus will be conditionally granted.

It is hereby

ORDERED that Heath A. Wilkins' First Amended Petition for Writ of Habeas Corpus is conditionally granted. This conditional issuance of the writ shall be unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this Order.

(signature)

SCOTT O. WRIGHT
Senior United States District Judge

May 16, 1995

United States District Court
WESTERN DISTRICT OF MISSOURI

HEATH A. WILKINS,
Petitioner,

JUDGMENT IN A CIVIL CASE

CASE NO. 91-0861-CV-W-5

v.

PAUL K. DELO,
Respondent.

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Heath A. Wilkins' First Amended Petition for Writ of Habeas Corpus is conditionally granted. This conditional issuance of the writ shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this Order.

May 18, 1995 R.F. Connor

Date *Clerk*

Entered on May 18, 1995
C. Morrison (signature)
(By) Deputy Clerk

Supreme Court of Missouri
en banc

HEATH A. WILKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71936
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF
CLAY COUNTY, MISSOURI
Honorable Glennon E. McFarland, Judge

Appeal from the hearing court's denial of defendant's Rule 24.035 motion. We affirm.

Defendant was sentenced to death for the murder of Nancy Allen during the robbery of a convenience store in Avondale, Missouri. The conviction and sentence were affirmed in *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), and reaffirmed in the United States Supreme Court. *Stanford v. Kentucky*[1], 492 U.S. ___, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). He now seeks postconviction relief presenting fourteen points of alleged error.

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[1]Defendant's case was consolidated with *Stanford v. Kentucky*, a case also involving a minor sentenced to death.

The operative facts of the crime may be found in 736 S.W.2d 409, 411-412, detailing Wilkins' vicious conduct which when coupled with other relevant evidence warranted the sentence of death. The record discloses that pursuant to a prearranged plan defendant and an accomplice murdered the helpless victim Nancy Allen. She was killed when seized by the accomplice and defendant

> thrust his knife into her back. Defendant said he was aiming at the kidneys, which he thought would be a fatal wound.
>
> Nancy Allen fell face down onto the floor. However, she rolled into a spread-eagled position with her back on the floor. Stevens [the accomplice] could not find everything that he wanted to take and could not operate the cash register. He asked defendant what to do. Nancy Allen replied, directing Stevens to what he sought but this caused defendant to stab his helpless victim three more times in her chest. Two of these pierced her heart. She continued to speak, begging for her life. Defendant silenced her with four stabs into the neck, one of which opened the carotid artery.
>
> As Nancy Allen's pierced heart oozed its life's blood into the opened cavities of her lungs and onto the floor, defendant and Stevens gathered up cash and merchandise and left the store. Defendant wiped fingerprints off the door

handle before leaving. They stuffed the stolen items in the bag outside and left. Nancy Allen lay dying on the floor.

736 S.W.2d at 412.

On August 10, 1985, defendant, then 16 years of age, was arrested with his accomplices in Kansas City, about two weeks following the murder. He was taken to the police station where he was advised of his rights and in the presence of his mother and a juvenile officer was interrogated by a police officer. Defendant confessed his part in the crimes describing in detail the planning and execution of both the robbery and murder.

On August 12, Mr. Fred Duchardt of the Clay County Public Defender's Office was appointed defense counsel and on August 15, a certification hearing was conducted in the juvenile court to determine whether defendant should stand trial as an adult. The evidence included defendant's medical and juvenile records and pursuant to §211.071, RSMo Supp. 1984, the court certified that defendant could be tried as an adult.

On October 8, defendant was charged by information with first degree murder, armed criminal action and unlawful use of a weapon. Represented by Duchardt, defendant was arraigned in circuit court of Clay County on October 17 and entered a plea of not guilty or "not guilty by reason of mental disease or defect excluding responsibility" to all three charges. The circuit judge ordered a mental examination of defendant by the Western Missouri Mental Health Center which was conducted by a Dr. Steven Mandracchia on November 27. Mandracchia's reports containing the results of his examination were filed with

the circuit court the following month and shortly thereafter defendant obtained an additional mental examination at his expense.

Sometime later, defendant confided to his attorney that he wished to withdraw his pleas of not guilty, enter pleas of guilty to all charges and seek the death sentence for the murder of Nancy Allen. Defendant's decision apparently grew from his realization that the evidence against him was overwhelming and it also appears he experienced some remorse for his acts. Most importantly his prior experience in various institutions convinced him that death would be preferable as he harbored a firm mindset against incarceration for the rest of his life.

In March of 1986, defendant was examined at his expense at the Menninger Foundation and the results of that examination became available in April. On April 16, a hearing was conducted before the Honorable Glennon McFarland in the Circuit Court of Clay County to determine defendant's competency at the time of the act as well as his competency to stand trial. The first witness, Dr. Mandracchia, stated unequivocally "there was no evidence of mental disease or defect as defined by Chapter 552 of the revised statutes of the state of Missouri" and that defendant was "competent to proceed." Dr. Mandracchia had examined defendant before learning that he reversed his position and intended to plead guilty and seek the death penalty. However, on being advised of defendant's changed intention, Mandracchia remained of the same opinion and testified, "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities." The next witness, Dr. W.S. Logan, director of Law and Psychiatry at Menninger, who examined defendant in

March, declined to state whether he felt defendant was competent to proceed to trial; rather, he testified defendant had average intelligence, understood the charges against him, the array of possible pleas open to him, the range of punishment, and could cooperate with his attorney. Logan, however, opined that defendant was proceeding under several errors of fact and was acting impulsively and had not thought through the consequences of his decisions. Though Logan testified that defendant suffered from some "emotional impairment where he would not be acting in necessarily his own best interests," he characterized "the execution of the crime as very purposeful, very deliberate, very well planned . . . [with defendant making] numerous efforts to avoid detection, showing that he appreciated the wrongfulness of it . . ."

At the close of the hearing, the court determined that defendant was competent to stand trial and at that point, Duchardt advised the court that defendant had asked him to withdraw as counsel and allow defendant to proceed pro se because Duchardt would not aid him in seeking the death penalty. The court questioned defendant as to his age, education, understanding of his right to counsel, and his motives for waiving counsel. The record is replete with the court's and counsels' careful, complete and detailed appraisal of defendant's right to and the need for counsel, with discussions centering on his situation and the gravity of the crimes. Judge McFarland refusing to rule defendant's motion to waive counsel and proceed pro se, continued the cause allowing defendant further opportunity to reconsider.

On April 23, the hearings resumed and again the court conducted careful questioning of defendant and in a lengthy conversation with him emphasized his right to

counsel and the benefits of such service. Defendant nevertheless executed written waiver of counsel, §600.051, RSMo 1986, and the court again inquired at length making absolutely sure that defendant understood the range of punishment for each crime. Further he informed defendant that if at any time he wished the service of counsel he would be immediately accommodated and Mr. Duchardt was directed to remain in the courtroom to act in an advisory capacity if defendant had any questions or decided to allow Duchardt to once more represent him. Additionally, the court attempted to dissuade defendant informing him he felt the decision to plead guilty and seek the death penalty was a poor one; stressing repeatedly the seriousness of defendant's intended actions, the court emphasized that point by describing the horrors of dying by lethal gas. Defendant acknowledged the court's concerns, but stood fast in his decision and the cause was again continued, this time until May 9, with Judge McFarland urging defendant to reconsider and think "fully" about his decision.

On April 29, prior to the plea hearing, defendant was brought before the court and given the waiver and guilty plea forms for all three charges. Defendant resolutely repeated his announced intention to plead guilty and waive his right to trial by jury.

On May 9, the defendant again came before the court with Duchardt present in his role as "standby" counsel, and the court again encouraged defendant to accept Duchardt as his counsel, but to no avail. Judge McFarland warned defendant that if he pleaded guilty to first degree murder the court "very probably" would sentence him to death. Defendant acknowledged that he understood this and only then did the court conduct

the requisite examination prefatory to acceptance of a guilty plea. In this examination, the Defendant stated he knew the range of pleas, punishments and rights to which he was entitled and asserted he had not been influenced by anyone else in his decision. Going further, he described the crimes and his part in their commission. The court accepted the pleas of guilty to all charges, including murder in the first degree; however, he informed defendant that should he change his mind and wish to withdraw his guilty pleas before the scheduled June 27 sentencing hearing, the court would consider such request. The court's last words to defendant at this hearing were that during the next month or so if he wished to be represented, the court would appoint an attorney for him. The defendant responded that he understood his rights.

At the June 27 sentencing hearing, defendant appeared with Duchardt present in the courtroom still in his advisory role. The court again recommended that defendant accept Duchardt's services as counsel but defendant declined and Judge McFarland assessed the maximum sentences for the lesser crimes. As to the first degree murder charge, the court first reiterated that defendant had the right to remain silent at his penalty phase of the trial, had a right to a jury at this stage and a right to counsel and encouraged him to reconsider. Defendant responded that he understood all this but wished to waive such rights. The court then offered defendant one last chance to withdraw his plea of guilty to first degree murder and again defendant declined informing the court he wished to proceed as previously stated.

Evidence was taken including defendant's incriminating statements given to the police on August

10, 1985, the testimony of the victim's husband, Robert Allen, several persons who had had contact with the defendant during his stays at various juvenile centers, and the testimony of Doctors Mandracchia and Logan. Considerable portions of defendant's juvenile records offered by the State were kept out by the sustained objections of the defendant himself. Then defendant called and attempted to elicit testimony of Patrick Stevens, alleged by defendant as an accomplice in the robbery. However, Stevens asserted his Fifth Amendment right against self-incrimination and refused to answer defendant's questions. In his closing comments to the court, the defendant stated he wished the court to consider all the harm he had done and the fact that he preferred death as against imprisonment.

The court entered its order assessing the punishment at death for the murder of Nancy Allen. In determining that the death penalty was warranted, the court found the following aggravating circumstances: "Number One, the murder in the first degree was committed while the Defendant was engaged in the perpetration of the felony of robbery, and, Number Two, the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman."

Defendant took no steps to appeal his sentences, however this Court on its own motion directed the State Public Defender to enter the case as amicus curiae and brief all issues within the purview of this Court's reviewing power under §565.035.1, RSMo 1986. On October 3, 1986, defendant and the attorneys for the amicus curiae appeared before this Court. At the conclusion of the arguments by the State and amicus curiae attorneys, defendant addressed the Court taking

issue with several of the public defenders' comments, in which it was stated that defendant was incompetent at the time of the crime, at the time of the trial and at the hearings. Defendant stated he was competent at all times and made a rational decision to seek the death penalty for his crime.

This Court ordered that defendant be examined by Dr. Parwatikar of the Malcom Bliss Mental Health Center to determine if he was competent to waive his right to counsel on appeal. On December 31, Dr. Parwatikar's report was filed with this Court stating that defendant suffered from a mental disorder which made him incompetent "to waive his Constitutional Rights and represent himself in front of the [c]ourt." The report further stated that the defendant was competent to aid and cooperate with any attorney who may be appointed for him. On this information, appellate counsel was appointed, new briefs were submitted and new oral arguments heard.

Sometime after the decision of this Court in September 1987, affirming the conviction and sentence, defendant's position changed. On June 28th, 1988, defendant filed in circuit court his pro se Rule 24.035 motion seeking postconviction relief. This motion was amended first on August 28 and again on May 16, 1989, with the filing of a fifty-page motion. A hearing on the amended motions was conducted by Judge McFarland during the period May 22-26, and concluding on June 5, 1989, in which the defendant called five doctors who testified concerning his competence. The State presented two witnesses, Mr. Duchardt and Dr. Mandracchia. The transcript of this proceeding contains almost one thousand pages and more than 600 pages of exhibits and on July 26, the court denied defendant's

motions. This appeal followed. Our review is limited to a determination of whether the hearing court's findings and conclusions are clearly erroneous. Rule 24.035(j).

The first of defendant's fourteen points is that Mr. Duchardt, while acting as his counsel in the juvenile certification proceedings, provided ineffective assistance by not requesting a mental evaluation. Procedurally, defendant is barred from raising the issue of his juvenile counsel's effectiveness. This Court in *Jefferson v. State*, 442 S.W.2d 6 (Mo. 1969), held that a defendant who has been transferred from the jurisdiction of the juvenile court to a court of general law may attack the juvenile proceedings either by a motion in the circuit court requesting dismissal of the information or seeking a remand to the juvenile court for a proper hearing. *Id.* at 12. Failure so to do constitutes a complete waiver of any objection tot he juvenile proceedings. *Id.*

In *State v. Abbott*, 654 S.W.2d 260 (Mo. App. 1983), defendant on direct appeal challenged the effectiveness of counsel before the juvenile court in a §211.071, RSMo 1978 proceeding, which resulted in defendant's certification for trial as an adult. Defendant charged that counsel had a "conflict of interest" which denied defendant full and adequate representation at the certification hearing but the court of appeals dismissed the point for defendant's failure to raise his objections to the juvenile proceedings before the trial court; such failure constituted a waiver of those complaints. This bar applies whether the defendant is seeking to raise the defects by direct appeal or in proceedings. *Richardson v. State*, 555 S.W.2d 83, 87

(Mo. 1977).[2] Further, it applies to alleged constitutional claims, *Ford v. State*, 534 S.W.2d 111, 112-113 (Mo. App. 1976), and to a minor defendant who waives objection to the juvenile court adjudication of suitability for prosecution by a subsequent voluntary plea of guilty in the criminal court. *Haliburton v. State*, 617 S.W.2d 417, 419 (Mo. App. 1981).

Even if defendant's claim were preserved for consideration, it would be unavailing. After a guilty plea, counsel's effectiveness is only relevant in a motion for postconviction relief to the extent it affects the voluntariness of the movant's plea. *Troupe v. State*, 766 S.W.2D 722, 723 (Mo. App. 1989). This requires that the defendant prove his counsel's performance was deficient and that prejudice resulted from the deficiency. *Sidebottom v. State*, 781 S.W.2D 791, 795 (Mo. banc 1989). Prejudice is shown by proof that but for counsel's unprofessional errors, there was a reasonable probability the result would have been different. *Id.* at 796.

Nothing in defendant's briefs or arguments discloses that counsel's alleged shortcomings before the juvenile court affected the voluntariness of his guilty plea. Indeed, defendant not only pleaded guilty to first degree murder but actively sought the death sentence. He was not acting under some mistaken belief or misunderstanding caused by Duchardt's representation. Further defendant's allegation that failure to request a mental examination by the juvenile court constituted ineffective assistance of counsel is meritless. We note

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[2]Although *Richardson* involved a Rule 27.26 proceeding, the procedural bar equally applies to motions under Rule 24.035.

that testimony from the Rule 24.035 hearing showed that the juvenile court had before it the complete documentation of defendant's previous institutionalization and various medical and psychiatric reports on the defendant. The juvenile court was, from its consideration of these reports and documents, aware of defendant's past mental problems. Failure to request a mental examination at this juncture cannot be said to indicate conduct rising to a level of ineffectiveness which subverted defendant's constitutional rights.

Defendant next asserts his conviction and sentence violates due process rights secured under the United States and Missouri constitutions and is violative of the Eighth Amendment's prohibition against cruel and unusual punishment in that he was "incompetent as a matter of law." On direct review counsel raised the issue of defendant's competency to stand trial and this Court rejected that challenge. *State v. Wilkins*, 736 S.W.2D at 415. Postconviction rule proceedings are not available as a vehicle to obtain a second appellate review of matters raised on direct appeal. *Arbeiter v. State*, 738 S.W.2D 515, 516 (Mo. App. 1987). Accordingly, this contention is denied.

Defendant for his third point alleges that Duchardt rendered ineffective assistance of counsel during defendant's murder trial in that he called an adverse witness to testify against defendant; failed to cross-examine this adverse witness; failed to present contrary medical testimony as to defendant's mental state; abandoned defendant during the trial; failed to object to the court's finding that defendant was competent to proceed; and failed to investigate the law and facts pertaining to the defendant's competence to proceed pro se.

As previously noted, for a defendant to succeed on a claim of ineffective assistance of counsel, he must demonstrate that counsel's performance was both deficient and prejudicial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In this case involving a guilty plea, our review is to determine whether counsel's alleged deficiencies affected the voluntariness of the plea. *Troupe v. State*, 766 S.W.2d 722, 723 (Mo. App. 1989).

The first instance of alleged ineffective assistance of counsel occurred when, during the competency hearing, Mandracchia testified that defendant was competent to proceed.

To address this issue we must reexamine the setting. At the arraignment, Duchardt entered a plea of not guilty and not guilty by reason of mental disease or defect on behalf of defendant. Voicing concern as to his client's competency to proceed, Duchardt requested that he be mentally examined. This motion was granted and defendant was examined by Dr. Mandracchia of the Western Missouri Mental Health Center. On receipt of Mandracchia's report, December 23, 1985, the defendant's counsel moved for an additional mental examination at defendant's expense. This too was granted and the additional examination was performed by Dr. Logan of the Menniger Foundation. At defendant's competency hearing, Duchardt called Mandracchia as his first witness who testified that in his opinion "there was no evidence of mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri" and that he felt that the Defendant had no "psychological, intellectual or cognitive limitations on his capabilities." On cross-

examination, he stated the defendant was competent to plead guilty or not guilty to the crimes charged.

Defendant's claim of ineffective assistance fails to disclose any prejudice from counsel's action of calling Mandracchia. The examination of defendant and the subsequent hearing were held in accordance with §552.020, RSMo Supp. 1985. Under §552.020.2, Mandracchia's report was filed with the trial court within sixty days following the order for the examination, and pursuant to §552.020.5, copies were delivered to the defense and the prosecution. The purpose is to provide equal access to testimony establishing or refuting medical defense, *State v. Meeks*, 655 S.W.2D 536, 539 (Mo. App. 1983), and this access is a matter of right. *State ex rel. Jordon v. Mehan*, 597 S.W.2D 724, 726 (Mo. App. 1980). Mandracchia's oral testimony was consistent with his report which the parties had in hand and had defense counsel not called Mandracchia beyond question the prosecution would have produced him as a witness. The point is denied.

Defendant's second subpoint charges that Duchardt was ineffective for not cross-examining Mandracchia as to the objective basis for his testing of defendant. Some four years later in the Rule 24.035 hearing, motion counsel cross-examined Mandracchia on the basis of his testing of defendant and discovered that he was unaware or had forgotten several aspects of Defendant's background, including certain hallucinations as a child. However, defendant again has failed to establish prejudice. We note that Mandracchia's competency report lists all documents used as his sources of information on defendant and a review of those items reveals the doctor had employed the very documents which defendant now claims that he

never read. At the Rule 24.035 hearing, held nearly four years after the report was made, Dr. Mandracchia understandably experienced some difficulty remembering all the documents he had used for the initial examination and it has not been shown that cross-examination of the sort defendant now urges would have been productive.

Mistakenly, defendant suggests *Miller v. State*, 498 S.W.2D 79 (Mo. App. 1973), is controlling here. In *Miller*, the court of appeals decided that an attorney who believed his client incompetent to proceed to trial but failed in part to contest the report of the medical examiner and subject that examiner to cross-examination at a competency hearing, had rendered ineffective assistance of counsel. *Id.* at 87. However, two factors distinguish *Miller* from the case before us. There, counsel advised defendant to plead guilty and waive many of his constitutional rights; in contrast, Duchardt consistently counseled against defendant's wish to plead guilty and seek the death sentence. In *Miller*, counsel appears to have remained silent until the postconviction hearing as to his reservations concerning defendant's competency, while Mr. Duchardt argued from the first day that he felt defendant was incompetent to proceed and it was he who sought a second examination to refute the Mandracchia report. Counsel's service to defendant at the competency hearing did not fall below accepted norms.

Defendant next asserts that counsel was ineffective for not offering certain testimony of Dr. Logan that Defendant was incapable of proceeding without counsel. At the competency hearing Logan testified as to his diagnosis of defendant's mental health, but would not give a definitive statement concerning defendant's

competence as defined in Chapter 552. However, at the postconviction motion hearing, Logan testified he found defendant definitively incompetent to proceed as his own counsel. Defendant now asserts this later piece of evidence should have been elicited. Again defendant fails to demonstrate a nexus between counsel's action and the voluntariness of his guilty plea. Duchardt devoted nearly four months attempting to turn defendant from the course he determined to take. Defendant himself advised the court that Mr. Duchardt informed him of available pleas, punishments and defenses, and had repeatedly attempted to dissuade him from his intended action. Mr. Duchardt as counsel[3] performed properly and defendant fails to state how his conduct either as active or "standby" counsel affected the voluntariness of defendant's plea. This failure is fatal to the contention. *Troupe v. State*, 766 S.W.2d at 723.

Defendant's fourth subpoint alleges that Duchardt was ineffective for "abandoning" defendant during the trial. In effect, defendant insists that counsel should some how have forced his services upon defendant. We can but sympathize with Duchardt for the dilemma in which he found himself. Defendant for some months prior to trial had repeatedly stated he intended to plead guilty and seek the death penalty; he insisted that Duchardt aid him in that quest and not attempt to thwart his plan. Duchardt felt he could not aid defendant in

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[3]As previously discussed, Duchardt was requested by the court to remain in the courtroom during all stages of defendant's trial and to be available for any questions that defendant may have had and act as "standby" counsel should defendant change his mind and wish representation by counsel.

this purpose and a conflict had arisen between attorney and client.

Defendant asserts that under the rules of Professional Conduct, Duchardt had a duty not to "abandon" his client or at a minimum should have sought the appointment of a guardian ad litem to represent the defendant's interest after Duchardt was dismissed as counsel. Several flaws are readily apparent in these assertions. First, Duchardt did not "abandon" his client by moving to withdraw as counsel. As we read the record, it was defendant who by pro se motion sought Duchardt's removal, and it must be emphasized that if not satisfied defendant had a right to discharge his lawyer. *Allen v. Fewel*, 337 Mo. 955, 87 S.W.2d 142, 145 (banc 1935). Defendant could not have been forced to accept Duchardt's representation. *State v. Thomas*, 625 S.W.2d 115, 124 (Mo. 1981).

Additionally, the term "abandon" connotes a complete withdrawal or walking away from the client without the client having a reasonable opportunity to obtain the service of other counsel. Such did not occur in this case. Even after defendant insisted he be dismissed Duchardt by direction of the court remained available to Defendant at every stage of the proceedings and was present in the courtroom throughout the trial. During interim periods, Duchardt was accessible to assist defendant with any legal question. Apparently defendant availed himself of this service by contacting Duchardt on several occasions and, in the penalty phase, defendant called upon Duchardt to speak on his behalf and to handle certain evidentiary objections that defendant wished to make. Mr. Duchardt's role is not without precedent and closely resembles the situation in *State v. Rollie*, 585 S.W.2d

78 (Mo. App. 1979), where the court held appointment of such a legal "assistant" was appropriate. *Id.* At 85.

Next, the Rules of Professional Conduct require that 'a lawyer . . . shall withdraw from the representation of a client if . . . . the lawyer is discharged." Rules 1.16(a)(3). Further, the Comments to this rule provide that in cases where the client is mentally incompetent, the attorney "should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client." Defendant conceded Duchardt withdrew at his insistence and the defendant's complaint in this regard is spurious. Further, it is noteworthy how readily current counsel for defendant with casual indifference to his own patent inconsistency, in one breath berates Duchardt for abandoning defendant and in the next chastises him for not withdrawing. As to the appointment of a guardian or its equivalent this suggestion ignores the fact that defendant was then within the aegis of the circuit court, his mental condition was at issue in an ongoing proceeding before that tribunal. The issue and defendant personally were subject to the jurisdiction of the court of general original jurisdiction and in that situation the "comment" to the rule had little relevance. Duchardt could not be expected to defiantly flout the circuit court proceeding and attempt to invoke the jurisdiction of the probate division or to somehow require the circuit judge to appoint a guardian. Neither the evidence nor the posture of the case accommodates such a notion. Further, Defendant was repeatedly advised by counsel and the court not to plead guilty and seek the death penalty. We must ask what effect could a guardian have had upon defendant's

resolve to plead guilty? In neither brief nor argument does defendant suggest an answer to that question.

For his fifth subpoint defendant alleges that counsel was ineffective for not objecting to the court's finding that the defendant was competent to proceed to trial. The chronology tells a tale belying this assertion. Duchardt represented defendant through the hearing and immediately on the heels of the ruling that defendant was competent to proceed, he advised the court of the hiatus between client and counsel. Defendant confirmed that he no longer wanted Duchardt to serve as his attorney and after much discussion and repeated suggestions by the court for defendant to reconsider, the court finally ruled that Duchardt was off the team and assigned to the role of "standby" counsel. The prerogative was no longer his to act as counsel and make objections or otherwise participate in those proceedings except at defendant's request. While it might be argued that defendant could have lodged an objection to the court ruling before he was removed, no prejudice resulted from his failure or inability so to do because the point was preserved and raised on appeal and the ruling of competence affirmed by this Court. The contention is denied.

Defendant's last subpoint alleges that Duchardt was ineffective for not investigating the law or facts pertaining to defendant's competence to proceed pro se. The record does not support the assertion that counsel did not research this area of the law and defendant has failed to meet the burden of proof. Rule 24.035(h). If this unsupported allegation were true, defendant has not shown how it might have affected the voluntariness of his guilty plea. *Troupe v. State*, 766 S.W.2d at 723. Defendant has failed prove that

Duchardt rendered ineffective legal assistance violative of his constitutional rights.

Defendant next alleges that he was deprived of his Sixth and Fourteenth Amendment rights in that Defendant's waiver of counsel was not knowing, intelligent, and voluntary. On direct appeal, appellate counsel asserted: "The trial court erred in finding appellant competent to proceed and in failing to make a separate finding as to appellant's competence to waive his constitutional right to counsel and to a jury trial," this because the evidence was "insufficient" and because "appellate competence to waive constitutional rights was not an issue at the competency hearing . . ." The point was ruled against defendant by the Court in the direct review and accordingly is barred from consideration in the Rule 24.035 proceeding. *Arbeiter v. State*, 738 S.W.2d 516. Even though defendant's point was ruled on direct review, defendant in this postconviction proceeding frames the issue in somewhat different language, tangentially asserting defendant was denied his right to counsel because his "waiver" was not "knowingly, voluntarily or intelligently made" for the reason that "appellant was mentally incompetent to proceed as his own counsel." The trial court entertained this current version of defendant's assertion as an issue not foreclosed by the direct review, and while he appears to have erred in so doing we are loathe to condemn his willingness to permit defendant the opportunity for further hearing on the competency issue and shall examine the record to determine if his findings were clearly erroneous.

We are mindful that an effective waiver of counsel must be voluntarily, knowingly and intelligently executed, *Faretta v. California*, 422 U.S. 836, 95 S.Ct.

2525, 2541, 45 L.Ed.2d 562 (1975), and the test depends "in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981). Here, defendant, possessed of a ninth grade education, was found to be of average intelligence and throughout demonstrated a credible level of competence in handling his case. In this connection a defendant need not have the skills and experience of a lawyer to competently and intelligently choose self-representation. *Faretta v. Arizona*, 95 S.Ct. at 2541.

In the postconviction hearing, defendant called a plethora of witnesses concerning his competency to waive counsel and proceed pro se. The State called Dr. Mandracchia who, as previously discussed, examined defendant and testified at trial to his competence to proceed. As hereinabove noted, Mandracchia had been apprised that defendant had decided to plead guilty and seek the death penalty but maintained he was nevertheless competent to proceed and concluded "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities." But Mandracchia "surprised" the State in the postconviction hearing by joining with the other professional witnesses and stating defendant was not competent to waive his constitutional right to counsel and proceed pro se. The hearing court determined that the testimony of defendant's witnesses as well as Mandracchia was "unpersuasive" and it was the court's responsibility to determine the credibility of witnesses and weigh the evidence. *See Eddes v. State*, 776 S.W.2d 463, 465 (Mo. App. 1989). The court may

reject any witness' testimony though no contrary evidence is offered. *Id.*

The transcripts of the original and postconviction proceedings reveal an experienced trial judge who cautiously and carefully dealt with the issues presented. There was no rush to judgment, indeed the record is replete with his studied refusal to proceed from one step to the next until all questions were resolved in so far as possible and protective measures invoked to secure defendant's rights. In the protracted proceedings hereinbefore discussed, Judge McFarland perhaps more than any person was favorably positioned to understand defendant and evaluate the evidence. He had ample opportunity to observe defendant and learn the innermost reason for his decision to waive counsel. This observation and oral examination of defendant could not be ignored and was necessarily taken into account when assessing the competency of a defendant to waive counsel. *Edwards v. Arizona*, 101 S.Ct. at 1884.

Judge McFarland's repeated detailed explanation to defendant of his right to counsel, the advantages of accepting appointed counsel, the gravity of waiving counsel and the seriousness of the charges against defendant extended over a two-month period and throughout defendant resolutely stated his desire to waive appointed counsel, proceed pro se, and plead guilty.

Waiving counsel, defendant executed the waiver form in accordance with § 600.051, RSMo.1986, and before accepting the waiver the court again made sure defendant understood the range of punishment, the

right to counsel, possible results from waiving counsel and defendant's right to a jury trial.

In addition, though defendant did not renounce his waiver of counsel, he manifested his cunning, availing himself of the services of "standby" counsel when it met his purpose. During the proceedings, defendant's competence was displayed and was not lost on the court whose many hours of counseling and conversation with defendant gave him special insight and understanding of the factual and legal issues. The point is denied.

The fifth claim of error is closely related to the previous point. Defendant asserts he was incompetent to plead guilty, waive trial by jury and waive investigation and presentation of mitigating evidence in the penalty phase of the proceedings. Again, we note the issue of competence to waive a jury trial was raised and ruled adversely on the direct appeal and is not a proper matter for postconviction relief, *Arbieter v. State*, 738 S.W.2d at 516, and a guilty plea waives the right to a jury trial in the guilt phase. *Griffith v. Wyrick*, 527 F.2d 109, 112 (8th Cir. 1975).

Defendant would have us separate competence to proceed from competence to enter a plea, when in law they are inseparable. *See Mikel v. State*, 550 S.W.2d 863, 869, 870 (Mo. App. 1977), and *Newbold v. State*, 492 S.W.2d 809, 818 (Mo. 1973). A finding of competence to proceed to trial is tantamount to a finding that one is competent to enter a plea of guilty. *Id.* This is simply a further effort by defendant to reargue the trial court's ruling of defendant's competence to proceed and accordingly is denied.

Similarly, defendant's assertion of incompetence to waive investigation and presentation of mitigating evidence during the penalty phase must fail. The finding that defendant was competent to proceed to trial carries the meaning that defendant is able "to assist in his own defense." § 552.020.1, RSMo 1986. A finding of competence to proceed pro se means that the defendant had competency to "call the shots" as to his defense, *State v. Howard*, 668 S.W.2d 191, 195 (Mo. App. 1984), including the introduction of mitigating evidence. In this regard, the prosecution during the penalty stage offered defendant's juvenile records and medical reports, but defendant's objections to this evidence was sustained as he did not want his past "dredged up" again in court.

The sixth point on appeal is that defendant's confession to the police taken at the time of his arrest was taken in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution because defendant was incompetent to waive his *Miranda v. Arizona*, 384 U.S. 436 (1966), rights and Mr. Duchardt was ineffective for not seeking to suppress that statement. This point was raised only in defendant's third amended Rule 24.035 motion filed may 16, 1989, nearly twelve months after his initial pro se filing. Rule 24.035(f) provides a limitation for such filing of sixty days from the date of the appointment of postconviction counsel. Defendant properly filed his first amended motion August 24, 1988, but the third amended motion raising the *Miranda* objection was filed more than six months after the deadline. Defendant's untimely contention is waived. *Day v. State*, 770 S.W.2d 692, 696 (Mo. Banc 1989), *cert. denied* 110 S.Ct. 186 (1989).

Defendant's seventh point on appeal asserts his death sentence exceeds the maximum authorized by law and is violative of the Ex Post Facto Clause of the United States and Missouri Constitutions. He argues the Missouri legislature did not intend to subject defendants as young as he to the death sentence, and by enlarging the scope of the statute this Court in effect created an ex post facto situation. The governing statutes on this matter do not bear out defendant's contention. Section 211.071, RSMo 1986, provides that any child between the ages of fourteen and seventeen who is alleged to have committed an offense which would be considered a felony if committed by an adult may after an appropriate hearing be "transferred [from the jurisdiction of the juvenile court] to the court of general jurisdiction and prosecuted under the general law." Under Section 565.020, RSMo 1986, the crime of murder in the first degree is a class A felony with a possible punishment of death. It defies credulity to assert that imposition of the death sentence in such cases was not intended. An ex post facto law is one which proscribes an act criminal not so proscribed when committed or one which enlarges the penalty after the violation. *State v. Davis*, 645 S.W.2d 160, 162 (Mo. App. 1982). At the time of defendant's crime, the laws as previously noted provided that a person age fourteen years or older could be subjected to the general jurisdiction of a criminal court and a person tried for first degree murder could receive as punishment the death sentence.[4] The point is meritless.

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[4]Section 565.020 has not been amended so that punishment for persons age fifteen and younger for the crime of first degree murder is life imprisonment only. § 565.020.2, RSMo Supp. 1990.

Defendant next complains the trial court failed to weigh evidence in mitigation when assessing the death sentence as required by §565.030.4(3), RSMo 1986. Here again, defendant would resurrect an issue decided adversely to him on direct review. *See State v. Wilkins*, 736 S.W.2d at 415. We note now, as we did then, the report filed by the trial judge states he considered three mitigating factors when assessing punishment against defendant: 1) the age of the defendant, 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and 3) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Not only is defendant's point procedurally flawed it misstates the facts.

The ninth point asserts that defendant's sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution because defendant is a juvenile and a presumption should exist that sixteen-year-olds are not sufficiently culpable to be eligible for the death sentence. This point has not only been addressed by this Court but also by the United States Supreme Court and in each instance this contention has been rejected. *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987); *sub. nom. Stanford v. Kentucky*, 492 U.S. ___, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Defendant may not use the postconviction rules as a platform to relitigate issues decided on appeal. *Arbeiter v. State*, 738 S.W.2d at 516.

For his tenth point defendant argues that Missouri's death penalty scheme is unconstitutional in that the aggravating circumstance "depravity of mind"

enumerated in §565.032.2(7), RSMo 1986, is unconstitutionally vague. Defendant's point was raised not only on direct review and ruled against him, but when raised in a later case this Court again found that the "depravity of mind" element is constitutional as applied by Missouri courts. *State v. Griffith*, 756 S.W.2d 475, 489-490 (Mo. banc 1988), *cert. denied* 109 S.Ct. 3175 (1989). The point is denied.

The eleventh point asserts the trial court heard inadmissible, incompetent and irrelevant evidence at the sentencing hearing in the form of a presentence investigation report, a victim impact statement and the testimony of Dr. Logan, all in violation of defendant's Sixth Amendment right to confront and cross-examine witnesses. This claim of trial court error available for consideration on direct appeal is not cognizable in a postconviction relief proceeding. *Bevly v. State*, 778 S.W.2d 297, 300 (Mo. App. 1989). However we note that Defendant's position is closely analogous to that of defendant in *State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990), in which defendant complained of evidence introduced during his sentencing hearing consisted of a presentence investigation report, a "victim impact statement", various documents including records of defendant's disciplinary problems in high school. *Id.* at 96. This Court ruled that the admission of the presentence investigation report is admissible by reason of Rule 29.07(a) and the admission of the "victim impact statement" did not run afoul *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), in that it was the trial court not the jury which determined the facts and decided punishment. *Id.* Such is this case. The admission of the presentence investigation report was proper and no prejudice resulted from the introduction of the victim impact statement.

Defendant next argues the trial court erred by allowing in evidence the testimony of Dr. Logan, privileged under §§552.015, 211.321, and 552.015, RSMo 1986. During direct examination of Logan in the sentencing hearing, the trial court turned to defendant and inquired if he "waived any privilege that you [defendant] might have to not have this witness [Dr. Logan] testify." Defendant responded that he did. Defendant acknowledged he had waived the privilege. *See State v. Evans*, ___ S.W.2d ___ (Mo. banc 1991) (No. 72549, decided January 8, 1991). Point denied.

Defendant's twelfth point alleges his sentence is unconstitutional in that the trial court permitted defendant, "a mentally ill juvenile offender", to terminate the investigation of his defense and waive his right to present mitigating evidence. This is merely a variant of defendant's fourth point on appeal. Having found defendant competent to waive counsel and proceed pro se, it follows that defendant was competent to "call the shots" as to his defense and decline to present any mitigating evidence he may or may not have had at the time. *State v. Howard*, 668 S.W.2d 191, 195 (Mo. App. 1984). Further, defendant's statement that "no mitigating evidence was received" by the trial court is simply not true. Defendant's age, his history of institutionalization, his mental history came in by way of the records and testimony defendant himself has relied upon for his assertion of his mental incompetence. Defendant goes on to state that "the judge as sentencer was not aware, and did not consider, all of the relevant evidence in mitigation that was available at the time or that would have been available through a reasonable investigation." Not only does the record prove false the assertion, but defendant fails to enumerate what this

"relevant evidence" might be. By so failing no prejudice is shown and the point is denied.

The thirteenth point on appeal is simply a request that this Court reconsider its "proportionality review" of defendant's sentence. Though the point has been finally determined and is not appropriate to this proceeding, a review of cases since the affirmance in *State v. Wilkins*, 736 S.W.2d at 417, reveals no disproportionality.

Finally, defendant contends the Rule 24.035 hearing judge erred in not finding that defendant's constitutional rights were violated because Mr. Larry Harman participated in defendant's prosecution. His role was that of a co-prosecutor. Harman had represented defendant seven years earlier in a minor juvenile matter and as the State suggests, this point is procedurally barred from consideration as it appeared for the first time in defendant's second amended motion filed several months after the filing deadline had run. *See* Rule 24.035(f). The deadline for filing such motions is mandatory and cannot be extended by the trial court. *White v. State*, 779 S.W.2d 571, 572 (Mo. banc 1989); *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989). Defendant's point is denied.

Judgment affirmed.

ALBERT L. RENDLEN, JUDGE

Roberston, Higgins, Covington, Billings and Holstein, JJ., concur; Blackmar, C.J., dissents in separate opinion filed.

Supreme Court of Missouri
en banc

HEATH A. WILKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71936
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

DISSENTING OPINION

I would reverse the judgment and remand the case for trial on the issue of punishment. The question of death versus life imprisonment has not been adversarially tried. Such a trial should be required in any case in which the state seeks to execute a person who was a juvenile at the time the offense was committed. I would allow the guilty plea to stand, but would leave the way open for reconsideration of the waiver of trial by jury. *Cf. State v. Bibb*, 702 S.W.2d 462 (Mo. banc 1985).

It is within our authority under Rule 24.035(a) to make such a holding. That rule reads in pertinent part as follows:

> (a) A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the judgment of conviction or sentence imposed violate

> the constitution or laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035. This Rule 24.035 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable.

Our authority is not foreclosed by any prior proceedings in this case. The defendant filed no notice of appeal, because he received the sentence that he then desired. The case came to use only because of our statutory responsibility to review all death sentences. We initially invited the public defender to file a brief amicus curiae, but then reconsidered and appointed the public defender as counsel. The public defender did not argue in support of the proposition I now advance. ***See State v. Wilkins,*** 736 S.W.2d 409, 414 (Mo. banc 1987).

The Supreme Court of the United States granted certiorari in ***Wilkins v. Missouri,*** 487 U.S. 1233 (1988), to consider a single point, as follows:

> Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and

its opinion dealt with only that point. It did not foreclose our consideration of any other points.

It cannot be successfully argued that the defendant "waived" the point by failure to appeal. The record shows clearly that he tried to waive any right to adversarial determination by discharging his counsel and urging the trial court to sentence him to death. Since I would not allow him to waive an adversarial hearing at the trial stage, I would not allow him to effect a waiver by failing to appeal. Since the absence of an adversarial determination is a flaw tainting the entire proceeding, it is appropriately considered in a Rule 24.035 motion.

I do not challenge the statement in the principal opinion as to the trial judge's painstaking efforts to make sure that the defendant understood the consequences of his actions. It is manifest that the defendant, as of that time, wanted to be sentenced to death. He repeated his desire, unequivocally and articulately, before this Court. But it was not his choice as to whether or not he would be sentenced to death. ***Wilkins,*** p. 422, fn. 14, Donnelly, J. dissenting. Sentencing is the responsibility of the jury or, if there is a valid waiver, of the trial judge.

Although the trial judge expressed a strong predilection toward a death sentence before he heard evidence of the punishment phase, I am confident that he exercised his customary thoroughness in evaluating the evidence and weighing the aggravating and mitigating circumstances. Nobody undertook to marshal

the evidence which might support a life sentence, or to argue the reasons for leniency. As the trial judge said in his findings, both the prosecutor and the defendant urged the death sentence. The court did not have the assistance of counsel in adducing the facts and arguments bearing on the death sentence.

I am not sure that a defendant's right to represent himself is absolute, and would question the ability of a person sixteen years old to understand the consequences of a decision not only to forego counsel, but to urge the death sentence affirmatively. But I will not argue that the waiver of counsel was invalid. I would hold that the court, when a juvenile affirmatively seeks the death penalty, should make use of the established procedure of appointing a guardian ad litem or amicus curiae to present evidence and argument against the death penalty. Only in this way can the court have the proper foundation for an informed decision.

Such a requirement would be consistent with decisions in other areas as well as with statutory policy. In ***Strahler v. St. Luke's Hospital,*** 706 S.W.2d 7 (Mo. banc 1986), we held that the legislature could not cause the statute of limitations to run against a minor. The opinion observed as follows:

> We think defendant's contention that plaintiff should not now be heard to complain because she was free to "initiate her own suit" plainly ignores the disabilities and limitations that childhood, familial relationships, and our legal system place upon a minor of tender years -- who has little if any understanding of the

> complexities of our legal system . .. Our society takes great pride in the fact that the law remains forever at the ready to "jealously guard" the right of minors. . . .

Id. at 10, 12.

I cannot understand how a person who could not settle a damage suit could be allowed to present an unchallenged argument in favor of his own execution.

Our legislature has decreed that a minor cannot make her own decision to have an abortion. Section 188.028, RSMo 1986. ***See Webster v. Reproductive Health Services***, ___ U.S. ___, 109 S.Ct. 3040 (1989). Yet the principle opinion would allow the defendant to connive of destroying his own life.

In ***Cruzan by Cruzan v. Harmon***, 760 S.W.2d 408 (Mo. banc 1988), this Court said:

> This State has expressed a strong policy favoring life. We believe that policy dictates that we err on the side of preserving life.

In writing as I do, I realized that the trial court found the defendant competent to stand trial. But it would be a mistake to assume that the issue is free from doubt. The defendant has a troubled psychological history, beginning when he was ten years old, ***Wilkins***, p. 422, Donnelly, J., dissenting. Dr. Parwatikar, who examined the defendant at the request of this Court, said that he was "incompetent to waive his constitutional right and represent himself in front of this Court." As a result, we appointed appellate counsel for

him instead of relying on an amicus curiae. How could he then be competent to waive trial counsel? Dr. Logan, who testified in the trial court, expressed strong reservations about his ability to act in his own interest, and, at the postconviction hearing, said that the defendant was incapable of proceeding without counsel. Dr. Mandracchia, who testified in favor of competency, testified at the postconviction hearing that the defendant was not competent to waive his right to counsel and proceed ***pro se***. Thus the state's own witnesses, when confronted with the realities of the defendant's choice, retreated from their prior positions. Their changed testimony should not simply be brushed aside as the basis that they were unpersuasive. We really should not hold the defendant to a choice made when he was probably incompetent, when the question is one of consenting to execution.

The defendant may be executed for the crime to which he has pleaded guilty. ***Stanford v. Kentucky***, 109 S.Ct. 2969 (1989). But let the adversary process work. Let there be evidence and argument in favor of life imprisonment. There is no compelling reason to hold the defendant to a decision to argue for his own death. The case is unique, and surely will not recur. What harm can there be in allowing a trial?

I would reverse for trial of the punishment phase.

Charles B. Blackmar, Chief Justice